DOCKET

No. 88-926-AFX
Status: GRANTED

Title: North Dakota, et al., Appellants
v.
United States

Docketed:
December 5, 1988

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for appellant: Spaeth,Nicholas J.

Counsel for appellee: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 5 1988	G	Statement as to jurisdiction filed.
2	Dec 21 1988		Brief amicus curiae of National Beer Wholesalers' Association, Inc. filed.
4	Jan 3 1989		Order extending time to file response to jurisdictional statement until February 3, 1989.
5	Feb 2 1989		Order further extending time to file response to jurisdictional statement until March 2, 1989.
6	Mar 2 1989		Motion of appellee to affirm filed.
7	Mar 8 1989		DISTRIBUTED. March 24, 1989
8	Mar 27 1989		PROBABLE JURISDICTION NOTED.
			**********
10	Apr 17 1989		Order extending time to file brief of appellant on the merits until May 25, 1989.
11	May 10 1989		Record filed.
		*	Certified copy of transcript of record and proceedings, 2 volumes, received.
12	May 25 1989		Brief of appellants North Dakota, et al. filed.
13	May 25 1989		Joint appendix filed.
14	May 25 1989		Brief amici curiae of National Alcoholic Beverage Control, et al. filed.
15	May 25 1989		Brief amicus curiae of National Beer Wholesalers' Association, Inc. filed.
16	May 25 1989		Brief amici curiae of Natl. Conference of State Legislatures, et al. filed.
18	Jun 14 1989		Order extending time to file brief of appellee on the merits until July 14, 1989.
19	Jul 14 1989		Brief of appellee United States filed.
20	Jul 27 1989		CIRCULATED.
21	Aug 9 1989	X	Reply brief of appellants North Dakota, et al. filed.
22	Aug 28 1989		SET FOR ARGUMENT TUESDAY, OCTOBER 31, 1989. (4TH CASE)
23	Oct 31 1989		ARGUED.

JURISDICTIONAL

STATEMENT

88-926

No. _____

In The

Supreme Court of the United States

October Term, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the twenty-first amendment gives North Dakota the power to require labelling of and reports concerning liquor destined for federal enclaves located in North Dakota.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–Continued

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In The

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court, which appears in the Appendix (App.) hereto, App. at A-23, is reported at 675 F. Supp. 555 (D.N.D. 1987). The opinion of the United States Court of Appeals for the Eighth Circuit, which appears in the Appendix hereto, App. at A-1, is reported at 856 F.2d 1107 (8th Cir. 1988).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit declaring North Dakota liquor regulations unconstitutional was entered on September 9, 1988. *See* App. at A-1.

A notice of appeal to this Court was timely filed in the United States Court of Appeals for the Eighth Circuit on November 16, 1988. *See* App. at A-35.

This appeal is being docketed in this Court within ninety days from the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

U.S. Const. amend. XXI, § 2:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

10 U.S.C. § 2488:

> **Nonappropriated fund instrumentalities: purchase of alcoholic beverages**
>
> (a) The Secretary of Defense shall provide that –
>
> (1) covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered, except that

> (2) in the case of malt beverages and wine such purchases shall be made from, and delivery shall be accepted from, a source within the State in which the military installation concerned is located.
>
> (b) If a military installation located in the contiguous States is located in more than one State, a source of supply in any State in which the installation is located shall be considered for the purposes of subsection (a)(2) to be a source within the State in which the installation is located.
>
> (c) In this section:
>
> (1) The term "covered alcoholic beverage purchases" means purchases of alcoholic beverages by a nonappropriated fund instrumentality of the Department of Defense with nonappropriated funds.
>
> (2) The term "State" includes the District of Columbia.

32 C.F.R. § 261.4 (1987):

> Procedures and guidance are prescribed in DoD 1015.3-R, "Armed Services Military Club and Package Store Regulations." Chapter 4, section C., of this guidance reads as follows:
>
> "C. *COOPERATION*. The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning

any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state."

N.D. Admin. Code § 84-02-01-05(1):

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

N.D. Admin. Code § 84-02-01-05(7):

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the state treasurer.

STATEMENT OF THE CASE

This suit was brought by the United States against the State of North Dakota and Robert E. Hanson, State Treasurer of North Dakota (hereinafter referred to collectively as the "State of North Dakota" or the "state"), in the United States District Court for the District of North Dakota. The United States invoked the district court's federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, 2201. In its Complaint the United States sought declaratory relief and an injunction against the enforcement of

North Dakota's liquor regulations as applied to prime source suppliers of liquor to federal enclaves located in North Dakota.

The state regulations in question, N.D. Admin. Code §§ 84-02-01-05(1), 84-02-01-05(7), require prime source suppliers to affix a label to each bottle of liquor destined for federal enclaves located in North Dakota. That label states that the liquor is exclusively for consumption within the federal military enclave. In addition, each supplier must file a monthly report showing the quantity of liquor shipped into the state during the preceding month.

North Dakota law prohibits liquor from entering the state's commerce other than through its established liquor distribution system. *See* N.D. Admin. Code § 84-02-01-05(2); N.D.C.C. §§ 5-02-01, 5-03-01. The state imposed the regulations challenged here in order to prevent the unlawful diversion of liquor, either en route to the federal enclaves or off the enclaves after delivery, into the state's domestic commerce.

The United States operates two military installations in North Dakota, neither of which is an exclusive federal jurisdiction enclave. The clubs and package goods stores located on the military installations are nonappropriated fund instrumentalities (NFIs) of the federal government and, as such, are not supported by direct government funding. The clubs and package goods stores on the military installations purchase alcoholic beverages for resale to military personnel, retired military personnel,

and their families. Through such efforts, clubs and package goods stores are self-supporting. Any profits resulting from the operations are expected to be used to support military recreational activities.

In response to the state's regulations, one prime source supplier informed the military that it would increase its prices from $.85 to $20.50 per case because of the additional costs of affixing a label to each bottle of liquor. Five other suppliers indicated that they preferred to fill orders to North Dakota military enclaves through their established wholesale outlets in North Dakota rather than to comply with the state's regulations. Other suppliers have indicated a willingness to comply with the state's regulations.

In its Complaint the United States asserted that North Dakota's regulations interfere with the purchase of liquor by the United States military and conflict with a federal regulation in violation of the supremacy clause of the United States Constitution. The regulation to which the United States referred, 32 C.F.R. § 261.4 (1987), provides that the military shall procure alcoholic beverages so as to obtain "the most advantageous contract, price and other considered factors."[1] The United States further alleged that if the military purchased its liquor from local North Dakota wholesalers, rather than prime source suppliers, its costs would rise approximately $200,000 to $250,000 annually.

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[1] 10 U.S.C. § 2488(a)(1) also requires the military to purchase alcoholic beverages "from the most competitive source, price and other factors considered."

The State of North Dakota responded in its Answer that the liquor regulations do not conflict with federal regulations or violate the supremacy clause of the United States Constitution. The state contended that the liquor regulations are lawful regulations authorized by the twenty-first amendment of the United States Constitution and are necessary to prevent the unlawful diversion of alcohol into the state's domestic commerce.

The parties stipulated the relevant facts and presented the case to the district court on cross motions for summary judgment. In granting summary judgment in favor of the state, the district court found that there is no conflict between the state regulations and federal law. The district judge reasoned that "[t]he state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase, but they do not prevent the federal government from obtaining those beverages at the 'lowest cost' [as the] 'lowest cost' has merely increased." App. at A-28 (footnote omitted). The court went on to hold that, even if a conflict were found to exist between the state and federal laws, the state's interests underlying its regulations outweigh the corresponding federal interests and, therefore, "enforcement of the state law is not barred by the Supremacy Clause." App. at A-31.

The United States appealed to the United States Court of Appeals for the Eighth Circuit. The case was heard by a three-judge panel, which reached a split decision. The majority concluded that "the twenty-first amendment provides no basis for regulating the means by which Congress has sought to order military liquor procurement and to provide for the welfare and morale

activities of military personnel." App. at A-12 - A-13. Accordingly, the majority found that North Dakota's attempt to regulate the shipment of alcohol through its territory was beyond the state's jurisdictional power. The majority also stated that "[e]ven assuming that the twenty-first amendment extends jurisdiction over the subject matter, . . . we find that the balancing of state and federal interests would lead us to conclude that the State's regulations are pre-empted by federal law." App. at A-13.

In his dissenting opinion, the Chief Judge of the Eighth Circuit disagreed, writing: "To urge federal pre-emption of this state regulation, which the majority concedes was passed in good faith to prevent diversion of out-of-state sales to military installations, by reason of [the] federal statute [requiring the government to purchase liquor for military establishments 'from the most competitive source, price and other factors considered'] is to eradicate any real meaning to the core provisions of the twenty-first amendment." App. at A-20 (footnote omitted). Chief Judge Lay concluded that "the state is within its power under the twenty-first amendment to enact this regulation." App. at A-22.

THE SUBSTANTIALITY OF THE FEDERAL QUESTION PRESENTED

In *United States v. Tax Commission of Mississippi*, 412 U.S. 363, 377 (1973), this Court determined that a state has the power "to regulate and control . . . shipments [of liquor destined for military enclaves] during their passage through its territory insofar as necessary to prevent

the 'unlawful diversion' of liquor 'into the internal commerce of the State.'" *See also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1964); *United States v. Texas*, 695 F.2d 136, 141 (5th Cir.), *cert. denied*, 464 U.S. 933 (1983). The Court in *Tax Commission of Mississippi* further recognized that "the State, of course, remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation *off the two bases* of liquor that has been purchased and is in fact 'destined for use, distribution, or consumption' within its borders." *Tax Commission of Mississippi*, 412 U.S. at 378 (emphasis supplied).

The State of North Dakota imposed the state regulations challenged here in order to prevent the unlawful diversion of liquor, either en route to the military enclaves or off the enclaves after delivery, into the state's domestic commerce. Accordingly, this case affords the Court the opportunity to define the precise functional limits of the states' powers to regulate the shipments of liquor destined for federal enclaves in order to control the unlawful diversion of liquor as discussed by this Court in *United States v. Tax Commission of Mississippi* and related cases.

This particular case presents a factual basis never before considered by this Court. Relevant prior Supreme Court cases have dealt with states' attempts to regulate directly the sales and/or use of liquor on federal enclaves.

For example, in *Collins v. Yosemite Park and Curry Co.*, 304 U.S. 518 (1938), this Court held that California could not require liquor sales facilities located within a national

park to obtain a California liquor license, pay the requisite license fees, and comply with California regulations concerning the sale and use of liquor in order for liquor to be transported through California to the national park.[2]

Similarly, in *United States v. Tax Commission of Mississippi*, 412 U.S. 363 (1973), this Court considered a case in which the Mississippi Tax Commission had tried to tax out-of-state distillers that were providing liquor directly to military enclaves located within Mississippi. The Tax Commission had required the distillers to collect and remit to the Commission the amount of the state's usual wholesale mark-up. The Tax Commission imposed these regulations not to prevent unlawful diversion, but strictly for revenue purposes. *Id.* at 378.

These cases, thus, do not delineate the limits of the states' authority to impose regulations to prevent unlawful diversion. As this Court stated in *United States v. Tax Commission of Mississippi*, the Court has not had the opportunity to "decide the precise parameters of the State's authority to regulate efforts to import liquor [destined for] federal enclaves [in order to deal with problems of unlawful diversion]." *Id.*

Here North Dakota imposed labelling and reporting requirements on prime-source suppliers in an attempt to limit or prevent unlawful diversion. The Eighth Circuit's determination that North Dakota's attempt to regulate

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[2] See also this Court's discussion of the *Collins* case in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332-33 (1964).

the shipment of liquor destined for federal enclaves exceeded its jurisdictional powers, therefore, raises an important question of federal law which has not been, but should be, settled by this Court.

There is another aspect of the Eighth Circuit decision that raises a substantial federal question. The Eighth Circuit majority, which assumed *arguendo* that the twenty-first amendment conferred jurisdiction on states to enact the regulations in question, also conducted a preemption analysis. The court found that the state's regulations were preempted by federal law.

The initial step in applying the supremacy clause and its attendant preemption principles is to determine whether state law conflicts with federal policy. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984). The majority below found such a conflict because North Dakota's regulations allegedly "stand[] as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress." App. at A-14 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)). The court determined that North Dakota's regulations prevented Congress from accomplishing its objective of "open competition designed to maximize revenue for welfare and morale activities." App. at A-16 (footnote omitted).

This Court has indicated that when state regulation of a government contractor merely increases the economic burden on the government, that regulation does not conflict with federal law in the absence of a clear Congressional intent to preempt. *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261, 269-75 (1943). In *Penn*

Dairies this Court held that Pennsylvania's minimum wholesale milk prices requirement did not conflict with federal legislation requiring the military to purchase its supplies from "the lowest responsible bidder" "in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable." *Id.* at 275.

The federal law in question, 10 U.S.C. § 2488(a)(1), requires the military to purchase alcoholic beverages "from the most competitive source, price and other factors considered." This case, therefore, raises a significant issue as to whether this competitive procurement policy actually conflicts with the state's law designed to prevent unlawful diversion.

In cases where a challenged state liquor regulation does conflict with federal law, this Court has proceeded to balance the competing federal and state interests to determine whether the state regulation must yield to federal policy. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Accordingly, assuming this Court were to find that a conflict exists in this case, this appeal asks the Court to balance, for the first time, the federal interests underlying the military's competitive procurement policy against the state's interests in preventing the unlawful diversion of liquor into its domestic commerce.

There are 49 states that have military enclaves located within their borders. The most recent government

study available to the state revealed that the military's package goods stores and clubs throughout the nation had liquor sales of $500 million in 1977. "The Tax Status of Federal Resale Activities," GAO Study 1-3 (April 19, 1979). As reflected in the record below, there have been instances of unlawful diversion into states' domestic commerce in the past. The unlawful diversion of liquor destined for military bases, or off the bases after delivery, is a real concern for the states. The magnitude of the military's liquor transactions and the associated threat of unlawful diversion are facts that the states simply cannot ignore.

The 49 states, in dealing with the inevitable problems that arise when sovereign federal enclaves are located within their borders, should be afforded the benefit of this Court's interpretation of the contours of the states' constitutional power to prevent unlawful diversion. Resolution of this important constitutional issue, therefore, will have significant, nationwide implications.

This Court should decide this important issue of the relationship between the states' twenty-first amendment powers and competing federal economic interests. If the economic interests of the federal government outweigh the states' interests in preventing the unlawful diversion of intoxicants in contravention of their liquor distribution systems, then the core of power reserved to the states by the twenty-first amendment, the only express reservation of power to the states in our Constitution, is, indeed, a narrow core.

CONCLUSION

This Court and lower courts have established that the twenty-first amendment empowers the states to regulate the shipments of liquor destined for federal enclaves to prevent the unlawful diversion of that liquor into the states' domestic commerce. Until this case, however, this Court has not had the opportunity to define the functional limits of that power. The uncertainties surrounding the states' power to regulate unlawful diversion needs definitive resolution by this Court.

For the reasons stated, appellants respectfully request the Court to note probable jurisdiction over this appeal.

Dated this 1st day of December, 1988.

Respectfully submitted,

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**UNITED STATES of America,
Appellant,**

v.

STATE OF NORTH DAKOTA, Robert E. Hanson, State Treasurer of North Dakota, Appellees

No. 87-5334.

United States Court of Appeals,
Eighth Circuit.

Submitted May 10, 1988.

Decided Sept. 9, 1988.

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HENLEY, Senior Circuit Judge.

In this appeal we must pass upon the constitutionality of North Dakota's attempts to regulate the military's purchase of alcoholic liquor from out-of-state suppliers. The State's regulations require out-of-state suppliers to affix a label to each bottle of liquor destined for a military installation in North Dakota stating that the liquor is exclusively for consumption within the federal military enclave. In addition, each supplier must file a monthly report showing the quantity of liquor shipped into the State during the preceding month.[1] While this is

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[1] North Dakota Admin.Code § 84-02-01-05(1) provides:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota schedule A report of all shipments and returns for each calendar month with the

(Continued on following page)

a case in which the parties may appear simply to bicker over liquor stickers, it implicates important constitutional considerations.

The United States brought this suit against the State of North Dakota for a declaration that the State's regulations are unconstitutional and for an injunction against their enforcement. The position of the United States is essentially that the regulations conflict with a federal regulation requiring the military to procure liquor under the most advantageous contract, and are therefore invalid under the supremacy clause of the United States Constitution. North Dakota responds that the twenty-first amendment, which forbids the importation of alcohol into a state in violation of the laws of that state, gives it the power to regulate the importation of liquor to military bases in order to control its unlawful diversion into the state's domestic commerce.

(Continued from previous page)

state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

North Dakota Admin.Code § 84-02-01-05(7) provides:

All liquor destined for deliver to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the state treasurer.

The case was presented to the district court on cross motions for summary judgment. The parties stipulated that the military bases in North Dakota are not exclusive federal jurisdiction enclaves.[2]

The outlets for alcoholic beverages on the military installations in North Dakota are clubs and package goods stores denominated non-appropriated fund instrumentalities (NFIs) of the federal government. NFIs are not directly supported with government funds. They exist for the purpose of generating profits to support military recreational activities. They accomplish this largely through the sale of alcoholic beverages to active and retired military personnel and their families. A regulation of the Department of Defense provides that the Department shall cooperate with local authorities but that "the purchase of all alcoholic beverages for resale [at military facilities] . . . shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors." 32 C.F.R. § 261.4 (1986). The regulation

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[2] The parties offered no evidence regarding the extent of the jurisdiction vested in the State. The court reasoned that it need not address the issue of jurisdiction inasmuch as the State is not attempting to regulate alcohol consumption within the federal enclave. *United States v. North Dakota*, 675 F.Supp. 555, 558 (D.N.D. 1987). However, the State does attempt to regulate the *transaction* between the distillers and the military: "the delivery, storage and sale--of the liquor occur[] exclusively within the [bases]." *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 377, 93 S.Ct. 2183, 2192, 37 L.Ed.2d 1 (1973) (discussing *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938)).

further provides that neither cooperation with local authorities nor the "other factors" bearing on the most advantageous contract shall be construed as requiring submission to state control, taxation, or requirements that alcoholic beverages be purchased from in-state suppliers. *Id.*

The trial court record shows that, in response to the State's regulations, one out-of-state supplier informed the Air Force that it would impose price increases ranging from $.85 to $20.50 per case. Five other suppliers refused to sell to military facilities in North Dakota. According to an affidavit from Robert Hanson, the State Treasurer, other suppliers, although we are not told how many, are willing to comply with the regulations.

The United States submitted an affidavit from Kim Keltz, the manager of the joint military service consolidated purchasing program for distilled spirits, stating that if the military is forced to purchase its distilled spirits requirements from local wholesalers, its costs would rise approximately $200,000.00 to $250,000.00 annually.[3] Mr. Hanson's affidavit stated that the labels were necessary to control diversion, and that he was "aware of the diversion of alcoholic beverages from North Dakota federal enclaves into the state's domestic commerce in contravention of the state's established liquor distribution system."

The district judge reasoned that, although the regulations may have indirectly caused an increase in the military's liquor costs, they did not conflict with the regulations requiring the most advantageous contract. Rather, they merely made the most advantageous con-

[3] *See infra* note 9.

tract more expensive. *United Stated v. North Dakota*, 675 F.Supp. 555, 557 (D.N.D.1987). The court went on to hold that, assuming a conflict between the State and federal interests, the State would prevail, as its interests in regulating the importation of liquor under the twenty-first amendment outweigh those of the government in procuring liquor at the lowest possible price. *Id.* at 558-59. Accordingly, the court granted the State's motion for summary judgment, and denied the summary judgment motion of the United States. The United States appeals. For the reasons that follow, we reverse.

Section 2 of the twenty-first amendment provides: "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The "core power" conferred on the states in § 2 is "that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713, 715, 104 S.Ct. 2694, 2704, 81 L.Ed.2d 580 (1984) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 945-46, 63 L.Ed.2d 233 (1980)). While the principal effect of § 2 is to free the states from the normal constraints imposed by the commerce clause, this freedom is not without limits, *Craig v. Boren*, 429 U.S. 190, 207, 97 S.Ct. 451, 462, 50 L.Ed.2d 397 (1976); *South Dakota v. Dole*, 791 F.2d 628, 633 (8th Cir.1986), *aff'd*, ___ U.S. ___, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), since the twenty-first amendment does not give the states the exclusive power to regulate liquor. *Dole*, 791 F.2d at 633. Determining the precise contours of state and federal power in this area is not necessarily a simple task,

however. *South Dakota v. Dole*, ___U.S.___, 107 S.Ct. 2793, 2795, 97 L.Ed.2d 171 (1987) (bounds of the amendment "have escaped precise definition"); *Midcal Aluminum*, 445 U.S. at 110, 100 S.Ct. at 946 ("no bright line between state and federal powers over liquor"). In this case, we must decide whether State power extends so far as to enable the State here to regulate instrumentalities of the United States over which the State exercises concurrent jurisdiction.[4]

The ability of a state to regulate liquor purchases by the military was the subject of two related Supreme Court decisions, *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973) ("Tax Commission I") and *United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) ("Tax Commission II"). The Mississippi Tax Commission had promulgated a regulation requiring distillers to collect a "wholesale markup," which the Court determined was a tax, from military purchasers. The Court held that, the twenty-first amendment notwithstanding,

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[4] The state's broad power to regulate alcoholic beverages rests largely on its greater power to absolutely prohibit them within its boundaries. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 166-67, 84 L.Ed. 128 (1939). But in cases of dual sovereignty over the same territory, one sovereign may not normally prohibit what the other permits. *Nielsen v. Oregon*, 212 U.S. 315, 321, 29 S.Ct. 383, 384-85, 53 L.Ed. 528 (1909). Thus, even putting aside supremacy clause considerations, which we take up *infra*, it is questionable whether a state could prohibit the importation of alcohol into military bases when its "co-sovereign," the United States, permits it, and the lesser power to regulate is correspondingly drawn into some doubt.

Art. I, § 8, cl. 17, of the Constitution[5] prohibited the state from regulating in any manner transactions occurring on those bases over which the military exercised exclusive jurisdiction. 412 U.S. at 369-71, 375, 93 S.Ct. at 2190-91. The Court rested its analysis on the language of the twenty-first amendment forbidding the unlawful "importation into any state," observing that an exclusively federal enclave is not within any state's territory. *Id.* at 375, 93 S.Ct. at 2190-91.

As noted, the parties to this case stipulate that the bases in North Dakota are not under exclusive federal jurisdiction, and the United States makes no argument for the application of Art. I, § 8, cl. 17. In *Tax Commission I*, however, the Court was faced also with determining the validity of state regulation in the context of concurrent state and federal jurisdiction over military installations. That issue was the subject of a remand and a subsequent appeal to the Supreme Court. In *Tax Commission II*, the United States attacked the state tax on the ground that it violated the principle, first set forth in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), that the national government enjoys immunity from state taxation by virtue of the supremacy clause.[6] 421 U.S. at 612-13, 95 S.Ct. at 1880-81. The Court agreed, citing *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964), and *Hostetter v. Idlewild*

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[5] Art. I, § 8, cl. 17, empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

[6] U.S. Const. art VI, cl. 2.

Bon Voyage Liquor Corp., 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). In *James Beam*, the Court had invalidated Kentucky's tax on the import of whiskey from Scotland on the ground that the tax violated the Export-Import Clause, Art. I § 10, cl. 2, and held that the twenty-first amendment had not repealed that clause. In *Hostetter* the Court held that the twenty-first amendment did not override the commerce clause to the extent that New York could prohibit the sale of liquor, under United States Customs supervision, to airline passengers departing for other countries. The Court concluded that "[s]imilarly, it is a 'patently bizarre' and 'extraordinary conclusion' to suggest that the Twenty-First Amendment abolished federal immunity as respects taxes on sales to bases where the United States and Mississippi exercise concurrent jurisdiction . . . ." 421 U.S. at 614, 95 S.Ct. at 1881 (quoting *Hostetter*, 377 U.S. at 332, 84 S.Ct. at 1298, *James Beam*, 377 U.S. at 345, 84 S.Ct. at 1249-50).

The United States argues that the *Tax Commission II* holding does more than merely prohibit state taxation of the NFIs; rather, it argues that the Court found all state regulation of liquor imports into concurrent jurisdiction installations prohibited. The United States quotes the following passage:

> When the case was last here we held that "the Twenty-First Amendment confers no power on a State to regulate – whether by licensing, taxation, or otherwise – the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution]." 412 U.S., at 375 [93 S.Ct. at 2190-91]; *see Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 [58 S.Ct. 1009, 1018-19, 82 L.Ed. 1502]

> (1938). Cf. *James v. Dravo Contracting Co.*, 302 U.S. 134, 140 [58 S.Ct. 208, 212, 82 L.Ed. 155] (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply . . . .

421 U.S. at 613, 95 S.Ct. at 1880-81. The sentence does not end there, however. Following a colon, the Court continues: "Nothing in the language of the Twenty-First Amendment nor in its history leads to the extraordinary conclusion that the Amendment abolished federal immunity with respect to *taxes* on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction." *Id.* at 614-15, 95 S.Ct. at 1881 (emphasis added, internal quotations and brackets omitted). This latter expression might be taken to modify "same conclusion" to mean that, with respect to taxation, the result is the same. On the other hand, the opinion may be read to apply the "same conclusion" terminology to a state's power *"to regulate* – whether by licensing, taxation, *or otherwise."* *Id.* at 613, 95 S.Ct. at 1880 (emphasis added). While engaging in a semantic exercise is interesting, we think it wise as well to explore to some extent the policies underlying the supremacy clause, since that is where the Supreme Court rested its decision.

The Supreme Court has explained the operation of the supremacy clause in the following terms:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy

> is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. *A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.* No other adjustment of competing enactments or legal principles is possible.

Mayo v. United States, 319 U.S. 441, 445, 63 S.Ct. 1137, 1139-40, 87 L.Ed. 1504 (1943) (footnote omitted) (emphasis added). It appears that this "corollary principle" is the underlying rationale for the Court's decision in *Tax Commission II*, and that it applies with as much force to the question of regulation as it does to taxation. This conclusion is bolstered by the Court's reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579, in both *Mayo*, 319 U.S. at 445 n. 5, 63 S.Ct. at 1139 n. 5, and *Tax Commission II*, 421 U.S. at 612-13, 95 S.Ct. at 1880-81. The need for uniformity underlying the supremacy clause cited in *Mayo* is as great, if not greater, with respect to the power to regulate as it is concerning the power to tax instrumentalities of the federal government.

The State correctly points out that federal interests generally may give way to weightier state interests when the state exercises its core power under the twenty-first amendment. *Crisp*, 467 U.S. at 713, 104 S.Ct. at 2707-08. That may be so when a private party, for example, asserts a constitutional or federally-created right or interest against the state's use of its twenty-first amendment power, but the *Tax Commission II* decision teaches that the state's "virtually unlimited" authority reaches its limits when the state attempts to exercise that power over an instrumentality of the federal government itself. This principle is inherent in the nature of the federal system:

the sovereignty of a state does not extend to the means by which Congress executes the powers conferred upon it. *McCulloch*, 17 U.S. (4 Wheat) at 428; *see Mayo*, 319 U.S. at 445, 63 S.Ct. at 1139-40. The essential function of § 2 of the twenty-first amendment, to free the states from the normal operation of the commerce clause, does not justify abrogating these longstanding principles. *United States v. Texas*, 695 F.2d 136, 139 (5th Cir.) (twenty-first amendment does not touch upon federal concerns beyond the commerce clause), *cert. denied*, 464 U.S. 933, 104 S.Ct. 336, 78 L.Ed.2d 305 (1983); *see also Craig*, 429 U.S. at 206, 97 S.Ct. at 461-62 (relevance of amendment to other constitutional provisions doubtful once passing beyond consideration of commerce clause).

In this case, Congress has acted pursuant to its constitutional prerogative to "raise and support armies," to "provide and maintain a Navy," and "to regulate the land and naval Forces." U.S. Const. art. I, § 8. Congress has provided that "alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered." 10 U.S.C. § 2488(a)(1).[7] In enacting this legislation, Congress considered, but rejected, a requirement that the military procure all its liquor from sources within the state where the installation on which the liquor is to be sold is located.[8]

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[7] Beer and wine purchases are excluded from this requirement. 10 U.S.C. § 2488(a)(2).

[8] The amendment was proposed and co-sponsored by Senator Andrews of North Dakota, a fact from which we draw no inferences. 132 Cong.Rec. S10936-37 (daily ed. Aug. 9, 1986) (Statement of Sen. Andrews).

Sen.Rep. No. 93-331, 99th Cong., 2d Sess. 283, *reprinted in* 1986 U.S. Code Cong. & Admin.News 6413, 6476. The Senate Report explains,

> The committee continues to object to such a requirement and has included a provision mandating that purchases of such alcoholic beverages for resale be made in the most efficient and economic manner, without regard to the location of the source of the beverages, except as that location may affect cost. . . . [T]he committee believes that procurement of alcoholic beverage for resale should be subjected to the same favorable effects of competition as is useful in the procurement of other goods and services. Additionally, the committee does not believe it appropriate to impose upon the Department, or the morale and welfare activities of the Department a requirement which will result in additional costs of tens of millions of dollars, caused by the imposition of indirect State taxation in [sic] the Federal government and the lack of competition.

Id.

Moreover, the history of military alcohol procurement reflects a longstanding policy of purchasing alcoholic beverages at the lowest available price and using the proceeds for the benefit of the welfare and morale of military personnel and their families. *United States v. South Carolina*, 578 F.Supp. 549, 553 (D.S.C.1983): Comment, *Pre-empting State Action Taken Pursuant to the Twenty-First Amendment*, 53 Temp.L.Q. 590, 600 (1980). Another aspect of the federal scheme worth noting is that recreational activities need not be supported by the federal government through appropriated funds so long as the NFIs are able to provide sufficient revenue. *Falls City Brewing Co. v. Reeves*, 40 F.Supp. 35, 39-40 (W.D.Ky. 1941); 132 Cong.Rec. S10936, 10940 (daily ed. Aug. 9, 1986) (statement of Sen. Goldwater). We conclude that the

twenty-first amendment provides no basis for regulating the means by which Congress has sought to order military liquor procurement and to provide for the welfare and morale activities of military personnel. *See McCulloch*, 17 U.S. (4 Wheat) at 428. Moreover, we incline to the view that *Tax Commission II* precludes state regulation notwithstanding the State's concurrent jurisdiction over the bases. *United States v. Texas*, 695 F.2d at 140 n. 8; *Rehner v. Rice*, 678 F.2d 1340, 1350 (9th Cir.1982), *rev'd on other grounds*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983).

Even assuming that the twenty-first amendment extends jurisdiction over the subject matter, *see United States v. Texas*, 695 F.2d at 138, we find that the balancing of state and federal interests would lead us to conclude that the State's regulations are pre-empted by federal law. The four primary considerations in weighing the state and federal interests are: "(1) the pervasiveness of the federal regulatory scheme, (2) whether federal occupation of the field is necessitated by a need for national uniformity, (3) the danger of conflict between state laws and the administration of federal programs, and (4) whether the state regulation infringes upon individual constitutional guarantees. . . ." *Id.* at 138-39 (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941); *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956)). The first three of these considerations are relevant here.

The first factor, the pervasiveness of the federal program, is essentially a vehicle for determining congressional intent to occupy the field. *See Pennsylvania v. Nelson*,

350 U.S. at 502-04, 76 S.Ct. at 480-81. Although regulations alone do not control, we must consider whether the regulations promulgated by an agency entrusted to carry out the congressional purpose express a desire to completely occupy the field. *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, 479 U.S. 130, 107 S.Ct. 499, 511, 93 L.Ed.2d 449 (1986). Here, the Department of Defense regulation specifically prohibits the military from submitting to local control over liquor procurement. 32 C.F.R. § 261.4. The second factor, the need for uniformity, also weighs in favor of the United States. Given the national scale and characteristics of the military, "Congress might validly conclude that such uniformity is desirable." *Hines*, 312 U.S. at 73, 61 S.Ct. at 407. An "integrated and all embracing system" for providing welfare and morale activities to military personnel appears to have been the congressional goal in enacting § 2488. *Id.* at 74, 61 S.Ct. at 407-08.

The third consideration, the danger of conflict between state law and the federal program, is perhaps the most decisive in this case. "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 [83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248] (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress,' *Hines v. Davidowitz, supra* 312 U.S. at 67 [61 S.Ct. at 404]." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713,

105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). The State's regulations fail at least the latter test.

Because Congress has mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities, we find that the State's regulations are in conflict with federal policy. The State does not dispute the military's projection of an annual increase in its annual liquor bill of $200,000.00-250,000.00[9]. This increase results directly from the effect that the State's regulations have in making out-of-state distillers less competitive with local wholesalers. Although nothing in the record compels us to believe that the regulations are a pretext to require in-state purchases, the effect in large part is to require the military to make purchases within the State – purchases that would not otherwise be competitive with

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[9] We are somewhat troubled by the lack of evidence in the record regarding how much of its distilled spirits the military will have to buy from sources in North Dakota. The affidavit of Mr. Hanson, the State Treasurer, states that some distillers did not object to the regulations and would continue to supply the military. The United States does not explain why it will have to purchase all of its liquor in-state, and thereby incur the $200,000.00-250,000.00 figure, if these sources are still available. Nor can we tell what percentage of the military's suppliers have either increased their prices or refused to deal. However, the State makes no argument on this point, and seems to acquiesce in the assertions of the United States. Moreover, the loss of six suppliers will have a significant financial impact in requiring the military to buy at least a substantial portion of its distilled spirits from within North Dakota, which it would otherwise have bought elsewhere.

out-of-state sources. As we have seen, this result conflicts with Congress' desire for open competition designed to maximize revenue for welfare and morale activities.[10]

Quite apart from the twenty-first amendment, the state has always had the right pursuant to its police power to take reasonable measures to prevent the unlawful diversion of liquor into its stream of commerce. *Tax Commission I*, 412 U.S. at 377, 93 S.Ct. at 2191-92; *Carter v. Virginia*, 321 U.S. 131, 137-38, 64 S.Ct. 464, 468-69, 88 L.Ed. 605 (1944); *Duckworth v. Arkansas*, 314 U.S. 390, 393-97, 62 S.Ct. 311, 312-15, 86 L.Ed. 294 (1941). But the State's regulations are subject to the same pre-emption analysis we have undertaken with respect to the twenty-first amendment. *Tax Commission I*, 412 U.S. at 377, 93 S.Ct. at 2191-92 (state's regulation of unlawful diversion may not conflict with any act of Congress or federal regulation); *Duckworth*, 314 U.S. at 396, 62 S.Ct. at 314. For the same reasons, the State's regulations must fail.[11]

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[10] North Dakota argues that the out-of-state distillers who refuse to sell to the military because of the regulations have expressed a preference for dealing with the military through their normal distribution channels, and that the regulations are merely an excuse to cease dealing with the military directly. In the absence of any evidence to the contrary, however, we presume that the distillers' motives are based on ordinary business decisions that legitimately reflect the economic realities of complying with North Dakota's regulatory scheme.

[11] North Dakota cites *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943), for the proposition that the federal immunity does not extend to those who contract to supply goods or services to the federal government. In *Penn*, the Court found nothing to indicate that congress intended to override local regulation

(Continued on following page)

We do note, however, that much of the foregoing analysis turns upon the federal interest in a uniform system of liquor procurement and attendant revenue for recreational activities. We do not discern any desire or intent on the part of Congress or the Department of Defense to completely displace the State's traditional power to regulate unlawful diversion of liquor in transit to the bases so long as the State does not trench upon the federal interests we have identified. Such regulation must not extend beyond what is reasonably necessary to protect the State's interest in preventing unlawful diversion. *Duckworth*, 314 U.S. at 396, 62 S.Ct. at 314. We need not here decide precisely how the State might legitimately further its interests. Rather than litigate *seriatim* every

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(Continued from previous page)

increasing the cost of milk to the federal government. *Id.* at 273-75, 63 S.Ct. at 622-24. However, the Court subsequently came to a different result when faced with a regulation which, unlike the regulation in *Penn*, made no allowances for state minimum price laws. *Paul v. United States*, 371 U.S. 245, 254-61, 83 S.Ct. 426, 432-36, 9 L.Ed.2d 292 (1963). The same result attaches here. Nor are we convinced by the State's argument that *Paul* admits of a different analysis for NFIs. *Paul* held that California's pricefixing scheme for milk could not be applied to military purchases from appropriated funds, which by federal statute were subject to a competitive bidding process. *Id.* at 262, 83 S.Ct. at 436-37. The Court remanded the case for a determination of whether California had jurisdiction to regulate purchases from non-appropriated funds, to which the statute did not apply. *Id.* at 270, 83 S.Ct. at 440-41. Here, the federal statutes and regulations expressly apply to nonappropriated funds and preclude submission to State control. Furthermore, unlike North Dakota's regulations, California's basic regulatory scheme may have existed at the time the federal government acquired jurisdiction which is significant for reasons we need not delve into here. *See id.* at 268-69, 83 S.Ct. at 439-40.

conceivable measure to combat unlawful diversion, it would be advisable for the parties, perhaps in conjunction with the distillers and other state governments, to negotiate a solution to the diversion problem by which all can abide.

In closing we also note that nothing in this opinion is meant to detract from the right of the State "to regulate or restrict, under § 2 of the Twenty-first amendment, the transportation off the . . . bases of liquor that has been purchased and is in fact destined for use, distribution, or consumption within its borders." *Tax Commission I*, 412 U.S. at 378, 93 S.Ct. at 2192 (internal quotation omitted).

For the foregoing reasons, the district court's orders granting summary judgment to the State of North Dakota and denying the motion for summary judgment by the United States are reversed.

LAY, Chief Judge, dissenting.

I respectfully dissent.

There is no question that the state regulation requiring labels on all bottles sold by out-of-state liquor distributors directly to federal enclaves in the State of North Dakota was not conceived to be, nor does it have the effect of, a tax on the federal government. Furthermore, the regulation involved is not an attempt to regulate liquor consumption on a federal enclave. This regulation is exclusively intended to prohibit the diversion of this liquor into the state's domestic commerce.

It should be clear that *Tax Commission I and II*[1] relied upon by the majority are distinguishable from the present situation. In holding that the twenty-first amendment does not provide state authorization to require labeling to prevent diversion of liquor sales within the state, the majority slights the statement of the Supreme Court in *Tax Commission I:*

> This is not to suggest that the State is without authority either to regulate liquor shipments destined for the bases while such shipments are passing through Mississippi or to regulate the transportation of liquor off the bases and into Mississippi for consumption there. Thus, while it may be true that the mere "shipment [of liquor] through a state is not transportation or importation into the state within the meaning of the [Twenty-first] Amendment," *Carter v. Virginia*, 321 U.S. 131, 137 [64 S.Ct. 464, 468, 88 L.Ed. 605] (1944), a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the "unlawful diversion" of liquor "into the internal commerce of the State," see *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S., at 333, 331 n. 10 [84 S.Ct. at 1299, 1297 n. 10]; *Carter v. Virginia, supra; Duckworth v. Arkansas*, 314 U.S. 390 [62 S.Ct. 311, 86 L.Ed. 294] (1941).

Tax Commission I, 412 U.S. at 377-78, 93 S.Ct. at 2191-93. The Supreme Court thus clearly observed that the twenty-first amendment provides states with the authority to prohibit diversion of liquor that is imported to federal enclaves located within its boundaries.

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[1] *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973) ("Tax Commission I") and *United States v. Tax Comm'n of Mississippi*, 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) ("Tax Commission II").

There is no conflicting federal regulation or statute which requires the finding of federal preemption. The controlling statute which allegedly supersedes the earlier regulation simply states that the government must purchase liquor for military installations "from the most competitive source, price and other factors considered * * *." 10 U.S.C. § 2488(a)(1) (Supp. IV 1986). To urge federal preemption of this state regulation, which the majority concedes was passed in good faith to prevent diversion of out-of-state sales to military installations, by reason of this federal statute is to eradicate any real meaning to the core provisions of the twenty-first amendment.[2] By virtue of this amendment, "a State is totally

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[2] The state succinctly refutes the preemption argument in its statement contained in its brief:

> Before a balancing of state and federal interests is necessary, however, there must exist clear congressional intent to preempt the area and a direct conflict between the state and federal laws. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447] (1947), cautions that "we start with the assumption that the historic police powers of the states are not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress." (Emphasis supplied.) Unless Congress's preemptive intent is abundantly clear, courts hesitate to invalidate state and local legislation for the added reason that "the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies*, 318 U.S. at 275 [63 S.Ct. at 624]. A review of the federal law in the present case fails to reveal a congressional intent, either express or implied, to preempt the state's liquor regulations aimed at preventing "unlawful diversion" in contravention of the state's established liquor distribution system. Furthermore, as determined by the lower court, there is no direct conflict between the state and federal laws.

Appellee's brief at 28.

unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed.2d 350 (1964). There is nothing in the history of the amendment which states that the military shall be exempt from the effects of all types of state regulation in its procurement of liquor. In fact, such a position would be ridiculous in light of the myriad of state regulations applied to distillers and suppliers of liquor. Compliance with regulations regarding the importation of raw materials, general operations of the distillery or brewery, treatment of employees, bottling, and shipping necessarily increase the cost of liquor. The congressional mandate to purchase liquor for military personnel at the "most competitive" terms nonetheless impliedly accepts the presence of these expenses as unavoidable factors that increase the lowest available prices.[3]

The record suggests that significant expenses would be incurred if out-of-state liquor distributors comply with the North Dakota regulation. It is also reasonable to assume that the expense of compliance would be passed along to the federal government if it purchased liquor from these distributors. This increase in price, however, is

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[3] This conclusion of the federal government's acceptance of these regulations is further bolstered with respect to state regulation prohibiting diversion by a Department of Defense directive which states that no member of the armed services shall divert "alcoholic berverages to unauthorized personnel, or for purposes which violate federal, state, or local laws* * *." DoD 1015.3-R, ch. 4, ¶F3.

neither the result of taxation nor an attempt to regulate liquor on a federal enclave. The regulation is solely intended to prevent diversion of out-of-state liquor destined for the military bases. As such, the state is within its power under the twenty-first amendment to enact this regulation. The federal government must accept the resulting increase in the cost of out-of-state liquor when it considers sources from which to purchase its liquor.

I therefore dissent.

UNITED STATES of America

v.

STATE OF NORTH DAKOTA; Robert E. Hanson, State Treasurer of North Dakota.

Civ. No. A1-86-212.

United States District Court,
D. North Dakota,
Southwestern Division.

June 24, 1987.

MEMORANDUM AND ORDER

CONMY, Chief Judge.

Both parties have moved the court for summary judgment in this action for declaratory and injunctive relief. There appear to be no genuine issues of material fact, and summary judgment is therefore appropriate. Fed.R.Civ.P. 56(c).

The following facts are undisputed.

Neither of the military installations in North Dakota are exclusive federal jurisdiction enclaves. The clubs and package goods stores located on military installations in North Dakota are non-appropriated fund instrumentalities of the federal government.[1] They purchase alcoholic beverages, including liquor, for resale to military personnel, retired military personnel, and their families.

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[1] A nonappropriated fund instrumentality is not supported by direct government funding. NFIs are expected to support military recreational activities through the generation of profits, by virtue of the sale of alcoholic beverages or otherwise.

The purchase of alcoholic beverages by the military is controlled by the Department of Defense Armed Services Military Club and Package Store Regulation, DoD 1015.3R, which provides as follows:

> C. COOPERATION. The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

32 C.F.R. § 261.4 (1986). The United States military is currently authorized to purchase alcoholic beverages, other than wine and malt beverages, from sources outside of the state in which it is situated. The military is required to procure these beverages from "the most competitive source, price and other factors considered." 10 U.S.C. § 2488 (1987).

The State has promulgated administrative regulations applicable to the sale and distribution of alcoholic beverages. Section 84-02-01-05(1) requires all persons sending or bringing liquor into the state to file with the State Treasurer a North Dakota Schedule A report of all shipments and returns for each calendar month. N.D.Admin.Code § 84-02-01-05(1) (1978). Section

84-02-01-05(7) applies specifically to liquor shipped to the military bases within the state:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in the form and manner prescribed and approved by the State Treasurer.

N.D.Admin.Code § 84-02-01-05(7) (1986).

On November 5, 1986, the State held a meeting of out-of-state distillers/suppliers to explain the labeling and reporting requirements for direct sales of alcoholic beverages to the federal enclaves within North Dakota.

By letter dated November 6, 1986, Kobrand Corporation informed the Air Force that the prices of alcoholic beverages would increase from $.85 to $20.50 per case due to the additional costs of affixing a North Dakota "tax stamp"[2] to each bottle of liquor.

Other out-of-state distillers/suppliers have indicated their unwillingness to deal directly with the installations located in North Dakota, but would prefer that the installations deal with their in-state representatives.

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[2] The State's regulations require that the distillers and suppliers are required to affix labels to each bottle; these labels will facilitate identification of intoxicants unlawfully diverted from the federal enclaves into the state's domestic commerce. The State asserts that the labels are not tax stamps, and do not constitute an attempt to tax the shipments.

The military estimates that the increased costs of dealing with in-state distributors, or continuing to deal with out-of-state distillers/suppliers under the North Dakota regulations, will be approximately $200,000 – $250,000 per year.

The Department of Defense may permit different hours and days of operation than are permitted by state law. The military has a policy of permitting the sale of liquor to individuals at a lower drinking age than that permitted by the state in which the installation is located, if the base is within 50 miles of a contiguous state that has a lower drinking age.

The United States argues that North Dakota's regulations violate the supremacy clause of the United States Constitution. The United States asserts that it is required to purchase its alcoholic beverages at the "lowest cost," and that that price is obtained by dealing through out-of-state distillers and suppliers. The regulations promulgated by North Dakota increase the military's cost of obtaining liquor and conflict with federal regulation. The United States seeks declaratory and injunctive relief.

The State argues that its regulations do not conflict with federal law, and that there is therefore no violation of the supremacy clause. The State further argues that its regulations are authorized by the Twenty-First Amendment as a means of preventing the unlawful diversion of alcoholic beverages from the federal enclave into the State.

Discussion

The proper analysis in this case is to consider first whether the North Dakota regulations conflict with federal law.

Enforcement of a state regulation may be pre-empted by federal law: (1) when Congress, in enacting a federal statute, has expressed its clear intent to preempt state law; (2) when it is clear that Congress intended, by legislating comprehensively, to occupy an entire field of regulation, and has thereby left no room for States to supplement federal law; and (3) when compliance with both federal and state law is impossible, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99, 104 S.Ct. 2694, 2700; 81 L.Ed.2d 580 (1984).

In this case, in order to find a conflict, this court must find that the state regulation constituted an obstacle to the accomplishment and execution of the full purposes of Congress. The Supreme Court has indicated that there is no clear test for determining the meaning and purpose of every act of Congress. Instead, a court must consider the circumstances of a particular case in making its determination. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941) (finding that state Alien Registration Act conflicted with federal Alien Registration Act). A party may successfully enjoin enforcement of a state law only if the law on its face irreconcilably conflicts with federal policy. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 3299, 73 L.Ed.2d 1042 (1982) (Sherman

Act did not pre-empt state statute unless statute mandates or authorizes conduct that necessarily constitutes a violation of antitrust laws in all cases, or places irresistible pressure on private party to violate law). A state regulatory scheme that merely imposes upon a federal regulation or activity without vitiating its impact or intent can be a valid exercise of the state's authority. *United States v. Texas*, 695 F.2d 136, 138 n. 6 (5th Cir.1983).

This court finds that there is no conflict between the state and federal regulations. "Lowest cost" is a relative term. The state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase, but they do not prevent the federal government from obtaining those beverages at the "lowest cost." The "lowest cost" has merely increased.[3]

If, however, this court found a direct conflict between the state and federal regulations, this court would then have to consider whether the state's regulations are a valid exercise of its power under the Twenty-First Amendment. Specifically, the court would have to consider whether the interests implicated by the state regulation are so closely related to the powers preserved by the Twenty-First Amendment that the regulation may prevail, notwithstanding that its requirements directly conflicted with federal policies. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 714, 104 S.Ct. at 2708. Resolution of this issue requires a pragmatic effort to harmonize state and

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[3] The "lowest cost" might also be enhanced by eliminating minimum wage, worker's compensation and payroll withholding laws from application to breweries and distilleries; or by coercing distillers and suppliers, through threat of nuclear attack, to provide alcoholic beverages at little or no cost.

federal powers within the context of the issues and interests at stake in each case. *Id.; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109, 100 S.Ct. 937, 945, 63 L.Ed.2d 233 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

Various cases have dealt with the constitutionality of state laws interfering with the sale of alcoholic beverages to federal enclaves. Generally, a state may not regulate the sale or distribution of alcoholic beverages destined for exclusive federal jurisdiction enclaves. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938) (where exclusive jurisdiction is in the United States, the Twenty-First Amendment is inapplicable and the state had no power to regulate shipments of alcoholic beverages delivered and used within the federal enclave); *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973) (because state has no jurisdiction, it is not empowered by Twenty-First Amendment to tax or otherwise regulate importation of alcoholic beverages into military bases over which the United States exercises exclusive jurisdiction); *United States v. Texas*, 695 F.2d 136 (5th Cir. 1983) (Twenty-First Amendment does not control in those areas where federal government has exclusive authority).[4]

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[4] The parties stipulate that the federal enclaves within the state are nonexclusive federal jurisdiction enclaves. The parties do not indicate the extent of jurisdiction retained by the state. Since the state is not attempting to regulate consumption of alcoholic beverages within the federal enclave, this court need not address the jurisdictional issue.

A state may, however, institute measures designed to prevent the unlawful diversion of alcohol from the federal enclave into the state's stream of commerce. *United States v. State Tax Commission of Mississippi*, 412 U.S. at 377-78, 93 S.Ct. at 2192 (state may regulate and control shipments during their passage through a state insofar as necessary to prevent unlawful diversion of liquor into internal commerce of state); *United States v. Texas*, 695 F.2d at 141 (state may institute measures designed to prevent unlawful diversion of intoxicants destined for federal enclave into state's stream of commerce).

The State asserts that the purpose of the regulation is to prevent the unlawful diversion of intoxicants from the bases into the state's stream of commerce. The United States asserts that there have been no instances of unlawful diversion of intoxicants from the bases into the state's commerce. The State disputes this assertion, and argues that there have been at least two instances of unlawful diversion, and that Mr. Hanson's office has been in contact with the United States on at least three occasions to discuss resolution of the situation.

This court can envision three federal interests to be served by obtaining alcoholic beverages at the lowest possible cost: providing those beverages to servicemen and their families at a discount rate, obtaining the largest possible profit, and preventing favoritism or corruption on the part of the purchasing officer.

The last interest is not affected by the state's regulations. And nowhere is it argued that Congress intended that economical intoxicants be provided as a fringe benefit for military service. The profits obtained from the sale

of these beverages theoretically go toward the support of recreational activities for servicepeople and their families. It is not clear, however, that the price increase would affect the military's profits, and ultimately, the military's recreational programs. Rather, it is much more likely that the increased costs will be passed on to the military consumer.

The case law is clear that the state has the authority to promulgate regulations designed to prevent the unlawful diversion of intoxicants. Whether or not there have been actual cases of unlawful diversion is not particularly relevant for our purposes; the purpose advanced by the State does not appear to be pretextual, and is therefore a valid exercise of its core power under the Twenty-First Amendment. When the State's significant interest in preventing unlawful diversion of alcoholic beverages into its stream of commerce is measured against the federal government's interest in keeping its costs down, it is clear that the federal government's interest is not of the same stature as the goals defined by the State. Accordingly, the balance tips decisively in favor of the state law, and enforcement of the state law is not barred by the Supremacy Clause. *Capitol Cities Cable*, 467 U.S. at 715-16, 104 S.Ct. at 2709.

Based on the foregoing, it is the ORDER of this court

1. THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

2. THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. THIS COURT FINDS THAT THE REGULATIONS PROMULGATED BY THE STATE ARE PERMISSIBLE UNDER THE TWENTY-FIRST AMENDMENT AS A MEANS OF

PREVENTING THE UNLAWFUL DIVERSION OF INTOXICANTS FROM THE FEDERAL ENCLAVES WITHIN THE STATE INTO THE STATE'S STREAM OF COMMERCE. ACCORDINGLY, THE CLERK IS DIRECTED TO ENTER JUDGMENT OF DISMISSAL WITH PREJUDICE IN THIS CASE.

United States District Court

DISTRICT OF
NORTH DAKOTA – SOUTHWESTERN DIVISION

United States of America,
V.

JUDGMENT IN A CIVIL CASE

State of North Dakota, Robert Hanson, State Treasurer of North Dakota

CASE NUMBER: A1-86-212

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff's Motion for Summary Judgment is denied. That Defendant's Motion for Summary Judgment is granted. Regulations promulgated by the State are permissible under the 21st Amendment as a means of preventing the unlawful diversion of intoxicants from the Federal enclaves within the state into the state's stream of commerce.

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 24th day of June 1987

EDWARD J. KLECKER, CLERK

By: /s/ Sharon J. Schmitcke
Deputy

June 24, 1987
Date

EDWARD J. KLECKER
Clerk

/s/ Sharon J. Schmitcke
(By) Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

State of North Dakota, Robert Hanson, State Treasurer of North Dakota, Defendants-Appellants,	)	No. 87-5334-ND
-vs-	)	
United States of America, Plaintiff-Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES
(filed Nov. 16, 1988)

NOTICE IS HEREBY GIVEN that the State of North Dakota, Robert E. Hanson, State Treasurer of North Dakota, the defendants-appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Eighth Circuit, entered in this action on September 9, 1988, reversing the district court's grant of summary judgment in favor of defendants-appellants State of North Dakota, Robert E. Hanson, State Treasurer of North Dakota, and denial of summary judgment in favor of the plaintiff-appellee United States of America.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 14th day of November, 1988.

State of North Dakota
Nicholas J. Spaeth
Attorney General

/s/ BY: Laurie J. Loveland
Laurie J. Loveland
Assistant Attorney General

/s/ Steven E. Noack
Steven E. Noack
Assistant Attorney General

Office of Attorney General
State Capitol
Bismarck, North Dakota
58505

Attorneys for Appellees

MOTION

No. 88-905

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
RICHARD FARBER
Attorney
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether regulations of the State of North Dakota, requiring out-of-state liquor suppliers to affix to each bottle of liquor sold to federal enclaves located in North Dakota a label stating that the liquor must be consumed on those premises and requiring those suppliers to file monthly reports, impermissibly interfere with the federal procurement scheme and otherwise fall outside the State's authority under the Twenty-first Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Regulations—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-926

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A1-A22) is reported at 856 F.2d 1107. The opinion of the district court (J.S. App. A23-A32) is reported at 675 F. Supp. 555.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. The notice of appeal was filed on November 16, 1988 (J.S. App. A35). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).[1]

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[1] The Court's appellate jurisdiction conferred in Section 1254(2) was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, § 2(a), 102 Stat. 662, but the repeal did not take effect until September 25, 1988 (§ 7, 102 Stat. 664). The repeal does not apply to this case, because it does "not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

In this case, the court of appeals held unconstitutional regulations promulgated by the State Treasurer of North Dakota under his

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. Article I, Section 8 of the United States Constitution provides in pertinent part: "The Congress shall have Power * * * To raise and support Armies * * * [and] To make Rules for the * * * Regulation of the land and naval Forces * * *."

Article I, Section 8 of the United States Constitution further provides in pertinent part: "The Congress shall have Power * * * to exercise * * * Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *."

Article IV, Section 3 of the United States Constitution provides in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

Article VI, Section 2 of the United States Constitution provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *."

Section 2 of the Twenty-first Amendment to the United States Constitution provides: "The transportation or

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statutory authority to regulate the State's liquor distribution system. See N.D. Cent. Code § 5-03-05 (1975). Those regulations, which are enforceable as state laws, appear to be "State statute[s]" within the meaning of 28 U.S.C. 1254(2). See *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 104-105 (1928); *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1877); cf. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 43 (1983).

importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

2. Title 10, United States Code, Section 2488 (Supp. IV 1986), provides in pertinent part:

(a) The Secretary of Defense shall provide that –

(1) covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered * * *.

Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4)[2] provides in pertinent part:

The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered. These other factors shall not be construed as meaning any submission to

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[2] In 1983, the Department of Defense amended the regulation by substituting the phrase "price and other factors considered" for the phrase "price and other considered factors." Department of Defense Change No. 1 for Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C. The Code of Federal Regulations inaccurately contains the original phrasing. We have inserted the corrected phrasing in our citation to the codified version of the regulation in the Code of Federal Regulations and will refer to that corrected version.

state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

3. Section 84-02-01-05(7), N.D. Admin. Code (1986), provides:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed by the state treasurer.

Section 84-02-01-05(1), N.D. Admin. Code (1986), provides:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

STATEMENT

1. The State of North Dakota contains two federal enclaves, Grand Forks Air Force Base and Minot Air Force Base, over which the State and the federal governments exercise concurrent jurisdiction. Each military installation contains clubs and package goods stores that sell alcoholic beverages exclusively to military personnel and

their families. These clubs and stores are "non-appropriated fund instrumentalities" (NFIs) of the federal government. Although operated by the military, they do not receive congressionally appropriated funds. Instead, the facilities support themselves; any profits generated from liquor sales are used to fund recreational and other support services for each base's military personnel and their families. J.S. App. A3, A23.

Under Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C, the military must obtain liquor for the NFIs "under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered" (32 C.F.R. 261.4).[3] In order to minimize cost, the military operates a "joint-military service consolidated purchasing program for distilled spirits" (D.R. 30).[4] Under this program, all military facilities in a thirteen state area, including the two North Dakota installations, purchase alcoholic beverages in bulk directly from distillers/suppliers, as opposed to purchasing from local wholesalers. This program enables the military to negotiate the best possible price, since it can avoid buying from distributors

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[3] Title 10, United States Code, Section 2488(a)(1) (Supp. IV 1986), directs the Secretary of Defense to provide that "covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered." The Secretary promulgated the Department of Defense Armed Services Military Club and Package Store Regulations under his rulemaking authority conferred by 50 U.S.C. App. 473 (1982 & Supp. IV 1986), which empowers him "to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces."

[4] "D.R." refers to the Designation of Record prepared by the Clerk of the District Court and filed with appellants' brief in the court of appeals.

at the local wholesale level whose prices include additional markups. Prices for liquor purchased by the military from out-of-state suppliers are significantly lower than those for liquor bought from licensed wholesalers within North Dakota.[5] See D.R. 3, 30.

2. Effective January 1, 1986, the State of North Dakota issued specific regulations aimed at the federal government's purchase of liquor at the two military bases located in the State.[6] The principal regulation, the labeling provision, requires all out-of-state liquor suppliers to affix to each bottle of liquor sold to those federal installations a label stating that the liquor must be consumed on those premises. N.D. Admin. Code. § 84-02-01-05(7) (1986). The regulation imposes no such labeling requirement on local suppliers and distributors. A companion provision calls for all suppliers to file a monthly report showing the quantity of liquor shipped into the State during the preceding month. N.D. Admin. Code. § 84-02-01-05(1) (1986).

In early November 1986, the State held a meeting for representatives of out-of-state distillers/suppliers in order to explain the labeling and reporting requirements for direct sales of liquor to the two federal military bases in

[5] Under the State's regulatory scheme, there are three levels of liquor suppliers: out-of-state distillers/suppliers, state-licensed wholesalers, and state retailers. The State imposes a tax at the wholesale and retail levels. See N.D. Cent. Code §§ 5-03-04 and 5-03-07 (1975).

[6] Appellant Robert E. Hanson, as the State Treasurer of North Dakota, actually promulgated the regulations under his statutory authority to regulate the State's liquor distribution system. See N.D. Cent. Code § 5-03-05 (1975). The regulations "have the force of law thirty days after the date of mailing to the persons affected by such regulations" (*ibid.*).

North Dakota.[7] As a result of the added administrative burdens and costs imposed by compliance with those new requirements, five out-of-state suppliers informed the military that they would no longer ship liquor to the bases in North Dakota. Another out-of-state distiller agreed to continue supplying liquor to the NFIs in North Dakota, but told the military that its prices would increase from $.85 to $20.50 per case in order to cover the additional costs of complying with the State's regulations. In light of these developments, the official responsible for the military's procurement of liquor stated: "If the installations in North Dakota are forced to purchase their distilled spirits requirements from in-State sources in the future, it will cost the installations involved between $200,000 and $250,000 per year more than if the purchases are made from out-of-State distillers/importers" (D.R. 32). J.S. App. A4, A25-A26; D.R. 30.[8]

3. On November 26, 1986, the United States filed this action against appellants in the United States District Court for the District of North Dakota. The complaint, reciting the factual background set out above, alleged that the labeling and reporting requirements of the State's regulations interfere with the federal military's procure-

[7] From December 1985 through October 1986, federal law required the military to procure liquor from the State in which the base was located. See Act of Dec. 19, 1985, Pub. L. No. 99-190, § 101, 99 Stat. 1185. As of November 1, 1986, however, Congress authorized the military once again to purchase liquor from the most competitive source regardless of location. See Act of Oct. 30, 1986, Pub. L. No. 99-591, § 101, 100 Stat. 3341; Act of Nov. 14, 1986, Pub. L. No. 99-661, § 313, 100 Stat. 3816. Hence, the labelling and reporting requirements imposed by appellants' regulations had no practical effect until November 1986.

[8] That official also estimated that the State's regulations would impose an additional cost of $50,000 for the military's immediate liquor procurement needs in November and December 1986 (D.R. 32).

ment of liquor, conflict with governing federal procurement law, and therefore violate the Supremacy Clause. The complaint sought a judgment declaring those regulations invalid and an injunction barring the State's enforcement of them as applied to military bases in North Dakota. J.S. App. A2; D.R. 1-7.

Appellants initially answered the complaint by contending that their regulations did not conflict with federal law. In any event, appellants argued that the Twenty-first Amendment authorized the regulations as necessary "to prevent the unlawful diversion of alcohol from military enclaves into the internal commerce of North Dakota" (D.R. 10). The parties thereafter entered into a stipulation of facts and filed cross-motions for summary judgment.[9]

[9] Appellants did not dispute the declaration submitted by the United States detailing the expected additional costs imposed by the regulations. Nor did appellants dispute that the five identified out-of-state suppliers would no longer service the bases in North Dakota and that another supplier would substantially raise its prices. See Declaration of Kim Keltz, Chief of the Special Contracts Branch, Air Force Nonappropriated Fund Purchasing Office, San Antonio, Texas (D.R. 30-32).

In support of their position, however, appellants submitted an affidavit of appellant Robert E. Hanson. That affidavit stated that "[v]arious distillers/suppliers have notified [him] that they intend to comply with [the regulations]" (D.R. 48). The affidavit did not identify those out-of-state suppliers. Moreover, the affidavit declared that Hanson, in his capacity as State Treasurer, is "aware of the diversion of alcoholic beverages from North Dakota federal enclaves into the state's domestic commerce in contravention of the state's established liquor distribution system" (*id.* at 49). The affidavit did not identify any such diversions, although it mentioned two incidents in Hawaii and Washington (*id.* at 50). In a second affidavit, Hanson ultimately did mention two instances of apparent diversion of liquor from the North Dakota military bases. Hanson could neither confirm that those diversions actually occurred nor relate the amount of liquor involved. *Id.* at 60-63.

4. The district court granted appellants' motion for summary judgment, concluding that the State's regulations do not conflict with the federal law requiring the military to purchase liquor at the "[l]owest cost" (J.S. App. A28). The court reasoned that the "state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase, but they do not prevent the federal government from obtaining those beverages at the 'lowest cost.' The 'lowest cost' has merely increased" (*ibid.* (footnote omitted)).

Even if there were a conflict, the court stated, it would need to balance the State's authority to regulate liquor under the Twenty-first Amendment against the federal government's interests (J.S. App. A28-A29). It ruled that a State has authority to impose regulations designed to prevent the unlawful diversion of liquor. The court accepted that proffered reason for the State's regulations, finding that it was not "pretextual,"[10] and therefore concluded that the regulations are "a valid exercise of [the State's] core power under the Twenty-first Amendment" (*id.* at A31). Turning to the competing interests, the court concluded that the State's "significant interest in preventing unlawful diversion of alcoholic beverages" clearly outweighed the federal government's interest "in keeping its costs down" (*ibid.*). Accordingly, the court alternatively held that the regulations at issue fall within the State's powers under the Twenty-first Amendment and are not barred by the Supremacy Clause (*ibid.*).

5. The court of appeals reversed (J.S. App. A1-A22). It first noted that Congress, in 10 U.S.C. 2488(a)(1) (Supp. IV 1986), implemented "a longstanding policy of purchasing alcoholic beverages at the lowest available

[10] The court stated that "[w]hether or not there have been actual cases of unlawful diversion is not particularly relevant" (J.S. App. A31); see note 9, *supra*.

price and using the proceeds for the benefit of the welfare and morale of military personnel and their families" (*id.* at A12). The court recognized the State's power under the Twenty-first Amendment, but observed that such power "reaches its limits when the state attempts to exercise that power over an instrumentality of the federal government itself" (*id.* at A10). Accordingly, the court concluded that the Twenty-first Amendment "provides no basis for regulating the means by which Congress has sought to order military liquor procurement and to provide for the welfare and morale activities of military personnel" (*id.* at A13).

The court of appeals also weighed the competing interests at stake in concluding that federal law preempted the State's regulations (J.S. App. A13-A18). It recognized the State's "traditional power to regulate unlawful diversion of liquor in transit to the [military] bases" (*id.* at A17), but found that the State's efforts here impermissibly conflicted with federal law. "Congress had mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities" (*id.* at A15). The court observed that the State's regulations will increase the military's annual liquor bill by more than $200,000, and that "the effect [of the regulations] in large part is to require the military to make purchases within the State—purchases that would not otherwise be competitive with out-of-state sources" (*id.* at A15-A16). The court held that "this result conflicts with Congress' desire for open competition designed to maximize revenue for welfare and morale activities" (*id.* at A16 (footnote omitted)).[11]

[11] Chief Judge Lay dissented (J.S. App. A18-A22). He concluded that the State's regulations, designed solely "to prevent diversion of out-of-state liquor destined for military bases," fall within the State's power under the Twenty-First Amendment (*id.* at A22). Under those circumstances, "the federal government must accept the resulting increase in the cost of out-of-state liquor when it considers sources from which to purchase its liquor" (*ibid.*).

ARGUMENT

The decision of the court of appeals, holding that the State's liquor labeling and reporting regulations impermissibly interfere with the federal government's procurement of liquor for military bases located in North Dakota, is correct. The decision does not conflict with any decision of this Court or any other court of appeals. Plenary review is therefore unwarranted and the decision should be summarily affirmed.

1. Appellants (J.S. 11-13), joined by the National Beer Wholesalers' Association, Inc., as amicus curiae (Br. 6-8), contend that the State's regulations, designed to prevent unlawful diversion of liquor, do not substantially conflict with the federal procurement scheme of obtaining liquor for military bases at the most competitive price. The record plainly belies that assertion. Under governing federal law,[12] the military must purchase liquor from the "most competitive source." As applied to the two bases in North Dakota, that federal scheme requires military procurement officials to purchase the liquor in bulk quantities directly from out-of-state distillers/suppliers because those suppliers were offering lower prices than licensed wholesalers within the State. See D.R. 3, 30; see also note 5, *supra*. As a result of the added administrative burdens and costs imposed by compliance with the State's new labeling and reporting requirements, however, five out-of-state suppliers would no longer ship liquor to military bases in North Dakota, and another such supplier would

[12] See 10 U.S.C. 2488(a)(1) (Supp. IV 1986); Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4).

do so only at additional costs of up to $20.50 per case. In sum, the State's regulations directly interfere with the federal government's efforts to obtain liquor from the "most competitive source," by forcing the military to use different suppliers and to spend over $200,000 more for liquor. J.S. App. A4, A25-A26; D.R. 30-32.

The Court has long held that, under the Supremacy Clause, federal law preempts state regulation where the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *e.g.*, *Schneidewind* v. *ANR Pipeline Co.*, No. 86-986 (Mar. 22, 1988), slip op. 6; *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984). Under 10 U.S.C. 2488(a)(1) (Supp. IV 1986), as the court of appeals correctly observed, "Congress has mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities" (J.S. App. A15). Here, the record established that the State's regulations will increase the military's annual liquor bill by more than $200,000 and will "require the military to make purchases within the State—purchases that would not otherwise be competitive with out-of-state sources" (*id.* at A15-A16). Under these circumstances, the State's regulations plainly conflict with the federal procurement scheme mandating "open competition" (*id.* at A16), and thus the court of appeals properly held that the State's regulatory efforts fail under the Supremacy Clause.[13]

[13] Moreover, the State's regulations, although nominally aimed at out-of-state liquor suppliers, are designed to regulate the federal enclaves themselves. Appellants have contended throughout the litigation that they imposed the labeling and reporting requirements "in order to prevent the unlawful diversion of liquor, either en route to the military enclaves or off the enclaves after delivery, into the state's domestic commerce" (J.S. 9). To the extent the State seeks to regulate the federal enclaves, its effort cannot be squared with the principle that, under the Supremacy Clause, "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States*, 319 U.S. 441, 445 (1943) (footnote omitted). That constitutional immunity, as this Court has held, obtains with particular force where a State seeks to regulate the federal government's exclusive authority over military procurement derived from Article I, Section 8 of the Constitution. *E.g.*, *Paul* v. *United States*, 371 U.S. 245, 250-263 (1963); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187, 189-190 (1956); see *United States* v. *Texas*, 695 F.2d 136, 139-141 (5th Cir.), cert. denied, 464 U.S. 933 (1983).

Appellants (J.S. 11-12) mistakenly rely on *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261, 269-275 (1943). In that case, the Court upheld a State's refusal to renew the license of a milk dealer who had sold milk to a military installation at prices below those prescribed by state law. In holding that state law did not impermissibly interfere with federal procurement law, the Court made clear that the applicable federal regulation, which otherwise called for competitive procurement, suspended that requirement "when the price is fixed by federal, state, municipal or other competent legal authority" (318 U.S. at 277 (internal quotation marks and citation omitted)). In other words, the State's regulatory efforts had not been preempted because Congress had effectively implemented a "hands off policy" concerning state minimum price laws (*id.* at 278). By contrast, here, as in *Paul* v. *United States*, 371 U.S. at 254-255, applicable federal law requires, without exception, that the military's procurement proceed on a competitive basis. Accordingly, the court of appeals' decision is entirely consistent with *Penn Dairies*.

2. Appellants (J.S. 8-11), again joined by the National Beer Wholesalers' Association, Inc., as amicus curiae (Br. 8-12), further contend that the Twenty-first Amendment authorizes the State to issue regulations designed solely to prevent the unlawful diversion of liquor within its borders. To be sure, as the court of appeals recognized, "the state has always had the right pursuant to its police power to take reasonable measures to prevent the unlawful diversion of liquor into its stream of commerce" (J.S. App. A16

(citations omitted)).[14] Contrary to appellants' assertion, however, the Twenty-first Amendment does not authorize the States to pursue that objective by regulating federal procurement of liquor to be supplied to federal military enclaves. See *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 613-614 (1975) (*Mississippi Tax Comm'n II*); cf. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 536-538 (1938). The Amendment "primarily created an exception to the normal operation of the Commerce Clause," *Craig* v. *Boren*, 429 U.S. 190, 206 (1976); in other words, Section 2 of the Amendment permits the States to regulate and tax private commerce in alcoholic beverages in a manner which might otherwise violate the Commerce Clause. See *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62-63 (1936). But "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig* v. *Boren*, 429 U.S. at 206.

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[14] Appellants have not asserted that the regulations were an exercise of the State's traditional police power. And to the extent appellants' claim under the Twenty-first Amendment can be construed as raising an issue surrounding the extent to which a State may prevent unlawful diversion of imported liquor within its borders (see J.S. 10-11, 13-14), that claim does not warrant plenary review where, as here, the State's efforts plainly interfere with lawful activities of the federal government mandated by Congress. The United States, however, does support the State's underlying policy against diverting untaxed liquor from federal enclaves to intrastate commerce. See Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § F3 (1982) ("Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements.").

Here, as mentioned previously, the State's regulations conflict with federal procurement law and with federal regulation of military enclaves and thus do not survive scrutiny under the Supremacy Clause. Accordingly, those regulations may not be resurrected under the Twenty-first Amendment. "The State's Twenty-First Amendment powers, though broad, are circumscribed by other provisions of the Constitution." *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 346 (1987). And this Court has made clear that the Amendment does not confer authority on the States to regulate the affairs of the federal government. See *Mississippi Tax Comm'n II*, 421 U.S. at 613-614 (Amendment does not "abolish[] federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction"); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 345-346 (1964) (Amendment does not authorize state tax on foreign importer of liquor where tax violated Export-Import Clause of Constitution); see also *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (recognizing Congress's broad power under the Property Clause (U.S. Const. Art. IV, § 3, Cl. 2)). Accordingly, the court of appeals properly concluded that the State's regulations fall outside any authority conferred by the Twenty-first Amendment.

Appellants (J.S. 8-10), without mentioning this Court's later decision in *Mississippi Tax Comm'n II*, rely heavily on the Court's statement in *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363, 377 (1973) (*Mississippi Tax Comm'n I*), that a State may, "in the absence of conflicting federal regulation," regulate liquor shipments destined for military bases located within the State. Appellants seriously misconstrue that statement. First, the Court plainly stated that, as a necessary but not sufficient condi-

tion, any state effort must not conflict with federal law. Here, as we have shown above and as the court of appeals expressly held, the State's regulations contravene applicable federal procurement law. In any event, in *Mississippi Tax Comm'n II,* the Court expressly held that "the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction * * * [or] concurrent jurisdiction * * * (421 U.S. at 613 (internal quotation marks and citations omitted)).[15]

[15] The National Beer Wholesaler's Association, Inc., as amicus curiae (Br. 9-10 n. 16), seeks to blunt the force of *Mississippi Tax Comm'n II* by suggesting that the decision held only that a State may not "impose[] the legal burden of taxation on the military as the ultimate purchaser." That contention cannot be squared with the Court's explicit conclusion (421 U.S. at 613) that the Twenty-first Amendment does not empower the States to regulate the federal government's direct importation of liquor into federal enclaves, like military bases, where the government exercises exclusive or concurrent jurisdiction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00134

AMICUS CURIAE

BRIEF

No. 88-926

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON,
STATE TREASURER OF NORTH DAKOTA,
Defendants-Appellants,

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE FOR NATIONAL BEER WHOLESALERS' ASSOCIATION, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether North Dakota can regulate, under the Twenty-First Amendment, out-of-state suppliers of liquor destined for concurrent jurisdiction military bases in North Dakota in order to prevent diversion of that liquor into commerce within North Dakota?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF AMICUS CURIAE FOR NATIONAL BEER WHOLESALERS' ASSOCIATION, INC. IN SUPPORT OF THE JURISDICTIONAL STATEMENT

INTERESTS OF THE AMICUS

This brief is submitted on behalf of the National Beer Wholesalers' Association, Inc. ("NBWA"), as *amicus curiae*, in support of the jurisdictional statement filed by the State of North Dakota.[1] The NBWA is a trade association representing the interests of 1,800 beer wholesalers and distributors nationwide. Because the distribution of beer and other alcoholic beverages is subject to pervasive state regulation under the Twenty-First Amend-

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[1] Consent to the filing of this brief, which has been obtained from counsel for both parties, has been filed with the Clerk of this Court.

ment, the NBWA and its members have a strong interest in ensuring the correct judicial interpretation of federal and state authority in this area. The NBWA has presented *amicus* arguments in other recent Twenty-First Amendment cases before this Court, including ones involving the proper delineation of authority over alcoholic beverages between the states and the federal government.[2]

THE QUESTIONS RAISED ARE SUBSTANTIAL

North Dakota, like every other state, regulates almost every aspect of the sale and consumption of liquor within its borders. As part of this comprehensive scheme, North Dakota prohibits the importation of liquor, even that destined solely for personal use, by any person who does not hold a state license.[3] Because any person leaving a military base in North Dakota with liquor that has not passed through the state's liquor regulation system violates the importation laws, package stores on military bases are ready conduits for liquor to enter a state in violation of North Dakota's no personal importation law. Since North Dakota cannot directly control the shipment of liquor to concurrent military bases within the state, it has required that such shipments from uncontrolled out-of-state suppliers be reported[4] and be identified by a label on each bottle of liquor noting that it is for consumption on military bases only.[5] The federal government has challenged those regulatory requirements as applied to liquor purchased for military package stores from out-of-state suppliers and shipped to concurrent jurisdiction military bases in North Dakota.[6]

The North Dakota regulations, held invalid by the court below, are an exercise of the "core power" recognized by this Court under Section 2 of the Twenty-First Amendment allowing the states to regulate the sale of or use of liquor within its borders. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713-14 (1984). When Congress decided to end Prohibition,[7] it ensured the authority of each state to control the liquor trade within its borders. Section 2 of the Twenty-First Amendment is the explicit grant of "broad power . . . to regulate the importation and use of intoxicating liquor within [a state's] borders." *Id.* at 712 (citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)).

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[2] Although NBWA members currently are not directly affected by the federal legislation in question, which specifically requires federal military purchases of beer from in-state sources (10 U.S.C. § 2488(a)(2) (Supp. IV 1986)), Congress recently has considered amendments allowing the federal military to procure malt beverages from out-of-state sources. *See, e.g.*, S. 2355, 100th Cong., 2d Sess. § 920 (1988) (as reported by Sen. Armed Services Comm.; section 920 was subsequently removed by floor amendment, 132 Cong. Rec. S5280-86 (daily ed. May 9, 1988)). However, should such legislation be enacted, similar issues would arise with respect to possible illegal diversion of beer. Indeed, North Dakota already has adopted a regulation to require labelling of out-of-state beer supplied to the military. N. Dak. Admin. Code § 84-02-01-06 (1986).

[3] Section 84-02-01-05(2) of the North Dakota Administrative Code requires all liquor entering North Dakota to be shipped "only to licensed wholesalers." There is no exception for liquor imported for personal use. Similar restrictions are common in other states. In addition to North Dakota, four states entirely prohibit importation of liquor by unlicensed individuals. Most other states severely limit the amount of liquor that individuals may bring into the state for personal use. *See* Appendix B *infra*. Eighteen states control the liquor trade in its entirety by operating wholesale and/or retail establishments.

[4] N. Dak. Admin. Code § 84-02-01-05(1). The regulations are reproduced in Appendix A *infra*.

[5] *Id.* § 84-02-01-05(7).

[6] A more elaborate description of the factual background appears in the Jurisdictional Statement filed by North Dakota.

[7] Even prior to the adoption of the Twenty-First Amendment, Congress nearly a hundred years ago granted each state the power to regulate interstate commerce in liquor entering the state for use therein. *See In re Rahrer*, 140 U.S. 545 (1891). *See also Craig v. Boren*, 429 U.S. 190, 205-06 (1976).

Pursuant to this power, the states have adopted an array of liquor regulations ranging from limits on liquor store hours of operation to absolute bans on liquor in certain parts of a state (*i.e.*, "dry counties"). Using its Section 2 power, North Dakota adopted regulations to identify illegal liquor being imported from military bases into the state. Unless the Eighth Circuit's decision is reversed, the long-standing balance between federal and state interests recognized by this Court in the regulation of liquor will be distorted in a manner that could irreparably restrict the scope of state authority so obviously intended to be granted by the Twenty-First Amendment.

This Court has never considered the issue of concurrent jurisdiction raised by this appeal—whether a state can regulate shipments of liquor destined for federal enclaves in order to prevent the unlawful diversion of liquor into the state. In rejecting North Dakota's authority here, the Eighth Circuit seriously impairs the power of states to control liquor distribution within their borders and interferes with the comprehensive authority clearly granted to the states by the Twenty-First Amendment.

The North Dakota regulations and their manner of implementation typify permissible state control over the distribution of alcoholic beverages, a power purposefully recognized and clearly protected by the Twenty-First Amendment. They merely require out-of-state suppliers[8] who did not hold North Dakota licenses (1) to file reports of deliveries to military bases in North Dakota and (2) to label each bottle with the notation that the liquor was for consumption only on a military

[8] North Dakota's regulations are meant to address problems of increased liquor supply in the state due to the presence of unregulated liquor on the military bases. They therefore do not affect those alcoholic beverages purchased by the military from in-state suppliers whose products pass through the state's regulatory regime.

base. This regulatory scheme both informed the state through the reporting requirement of the amount of unregulated liquor present on military bases (permitting North Dakota to monitor possible diversion into surrounding communities) and identified through the labelling requirement out-of-state liquor purchases (permitting a determination of whether individual bottles of liquor were improperly diverted from the military base).

This Court has previously acknowledged the special power of the states to control liquor delivered within the state, including deliveries to concurrent jurisdiction federal enclaves within the state. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 380 (1973) (*"Mississippi Tax Comm'n I"*). In particular, it has acknowledged the ability of a state "to regulate or restrict, under section 2 of the Twenty-first Amendment, the transportation *off* [military] bases of liquor that has been purchased [on the base] and is in fact 'destined for use, distribution, or consumption' within [the state's] borders." *Id.* at 378 (emphasis added) (quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966)).

North Dakota's regulations flow directly from the Twenty-First Amendment's grant of authority to the states, recognized by prior decisions of this Court, which make clear that state regulation during transit within the state as well as after purchase is permitted. There is no legitimate basis for restricting this authority where liquor is purchased on a concurrent jurisdiction military base within the state and is then transported illegally off the base into the state. The Court should accept jurisdiction over this appeal to prevent an erroneous limitation of state core powers under the Twenty-First Amendment, which, unless reversed, will cripple North Dakota's ability to control the distribution of alcoholic beverages within its borders.

A. North Dakota's Regulations Are Not In Conflict With The Federal Regulatory Scheme.

While the lower ~~court~~ has misread North Dakota's constitutional authority, this Court need not reach the Twenty-First Amendment issue because no conflict exists between the state action and the federal statute and regulations. Thus, the state regulations are not pre-empted under the Supremacy Clause.[9] North Dakota's regulations impose only a *de minimis* burden on federal purchases of liquor from out-of-state suppliers. By establishing labelling and reporting requirements, North Dakota has adopted regulations narrowly tailored to its interest in preventing diversion of liquor from military reservations into the state's commerce.

1. *The Federal Statute and Regulations Recognize "Other Factors" in Purchase Decisions, Including Respect for State Anti-Diversion Laws, and This Clearly Modifies the Lowest Price Requirement.*

No express federal preemption exists here nor can any implied preemption be found. The federal statute clearly states that liquor purchasing decisions should be based

[9] This Court's traditional, three-pronged preemption test applies to conflicts between state liquor regulations and federal statutes and regulations:

> [T]he enforcement of a state regulation may be pre-empted . . . in several circumstances: first, when Congress . . . has expressed a clear intent to pre-empt State law; second, when [even absent specific language] Congress [clearly] has intended, by legislating comprehensively, to occupy an entire field of regulation . . .; and, finally, when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to . . . the full purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, 467 U.S. at 698-99 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (citations omitted). As discussed below, even if such conflict were found to exist, the state regulations must be given precedence because they were adopted pursuant to its "core power" to regulate and prevent diversion of unregulated liquor in the state. *See id.* at 714.

on "price and *other factors* considered."[10] The implementing Department of Defense ("DoD") regulations stress that care should be taken that package store liquor *not be diverted in violation of "federal, state, or local laws . . . ."*[11] These regulations acknowledge state anti-diversion laws and accept them as not asserting any impermissible authority over military sales. Thus, the federal regulations do not conflict with the state anti-diversion regulations.

In other contexts, Congress has also shown concern that state authority over the consumption of liquor should be respected. *See, e.g.*, 10 U.S.C. § 2683(c) (Supp. IV 1986) (requiring military reservations to adopt the minimum drinking age of the state where the reservation is located). Reading the federal statutory provision *in pari materia* with the other federal statutes and regulations confirms that no conflict exists between the state regulations and federal law. The DoD regulations indicate that whatever uniformity or cost reductions Congress mandated in the liquor purchase program should not be pursued to the detriment of state diversion concerns. DoD Reg. 1015.3-R, ch. 4, ¶ F3.

2. *The North Dakota Regulations Do Not Impose Any Direct Burden on the United States.*

Nor do the North Dakota regulations impose an impermissible burden on the United States so as to preempt

[10] 10 U.S.C. § 2488(a)(1) (emphasis added). One DoD package store regulation pre-dating § 2488(a)(1) contains language limiting the definition of "other factors" by excluding "submission to state control" as an other factor. 32 C.F.R. § 261.4 (1987) ("other factors" shall not mean "submission to state control, nor shall cooperation be construed . . . as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase beverages within geographical boundaries . . . ."). North Dakota does not assert any jurisdiction over the military through its regulations, nor does it require the military to pay any additional costs imposed on the out-of-state suppliers.

[11] DoD Reg. 1015.3-R, ch. 4, ¶ F3 (1982).

the state regulation's effect. They do not, for example, require a federal instrumentality to pay a state liquor tax. *Compare United States v. Tax Comm'n of Miss.*, 421 U.S. 599, 606-09 (1975) (*"Mississippi Tax Comm'n II"*). Because North Dakota does not demand that the labels be purchased from it, the sale of the labels does not provide any revenues to the state. The North Dakota regulations similarly do not require that the United States pay the cost of the labels.[12] Thus, the only "cost" borne by the United States is the economic incidence of the cost of the North Dakota regulations, and the United States is free to require the vendors to absorb that cost.[13] As a result, this case does not constitute impermissible state taxation of a federal instrumentality.[14]

B. North Dakota's Interest in Preventing Diversion of Liquor Within its Borders Is Protected by the Twenty-First Amendment and Outweighs the Asserted Federal Interest.

While we believe no conflict exists between the North Dakota regulations and the military liquor purchase

[12] *Compare Mississippi Tax Comm'n II*, 421 U.S. at 608 (invalidating Mississippi's regulation because it required the out-of-state vendors to charge the cost of the Mississippi markup to the federal purchaser).

[13] The Eighth Circuit's reliance on *Paul v. United States*, 371 U.S. 245 (1963), is misplaced. *United States v. North Dakota*, 856 F.2d 1107, 1114 n.11 (8th Cir. 1988). In *Paul*, the California regulation directly set prices which prevented the open competition mandated by federal statute. *See* 371 U.S. at 253-55. North Dakota does not impose any specific price or charge on the bottlers; they may freely compete to supply properly labelled liquor at the lowest possible cost. *Cf. Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 269-75 (1943) (when state regulation of a government contractor merely increases the economic burden on the government the regulation does not conflict with federal law in the absence of clear Congressional intent to preempt).

[14] *See Alabama v. King & Boozer*, 314 U.S. 1, 8-9 (1941) (when only the economic incidence of a tax falls on the United States, but not its legal incidence, the state regulation imposes no impermissible tax or burden on a federal instrumentality).

programs, even if such a conflict were found, this Court has recognized that state regulations within the "core powers" of the Twenty-First Amendment may prevail over conflicting federal regulations. *Crisp*, 467 U.S. at 714.

1. The Eighth Circuit Failed to Give Proper Deference to North Dakota's Interest in Preventing Diversion of Unregulated Liquor Within Its Borders.

In its opinion below, the Eighth Circuit majority reversed the normal order of analysis by first reviewing the North Dakota regulations under the Twenty-First Amendment before analyzing whether a conflict existed with the federal provisions. It found that North Dakota's regulations were an impermissible regulation of the military and that the Twenty-First Amendment was inapplicable when the "state attempts to exercise [its core] power over an instrumentality of the federal government itself." *United States v. North Dakota*, 856 F.2d 1107, 1111 (8th Cir. 1988).

But the Eighth Circuit failed to explain why North Dakota's regulations applicable to out-of-state suppliers constituted regulation of the federal military. In fact, the state regulations are carefully written so that whatever burden they impose is borne only by the supplier.[15] In addition, here the state and the federal governments have concurrent jurisdiction over the military bases in North Dakota and, as this Court has acknowledged, the state's jurisdictional authority and interest is broader as a result.[16]

[15] *Cf. Washington v. United States*, 460 U.S. 536 (1983) (allowing state sales tax on the purchase of materials by federal contractors). *Washington* provides a useful analogy, since the Court did not hold that state taxes imposed on suppliers to the federal government were automatically impermissible tax burdens on the government itself.

[16] *Mississippi Tax Comm'n I*, 412 U.S. at 380. When the question of the legitimacy of the state regulations as applied to the con-

2. *State Action to Prohibit Diversion of Unregulated Liquor Into Areas Under the State's Jurisdiction Involves the "Core Powers" of the Twenty-First Amendment.*

This Court's decisions interpreting the Twenty-First Amendment reflect a consistent theme: state laws and regulations adopted to prevent diversion of unregulated liquor are to be given special consideration in performing the balance mandated by the Twenty-First Amendment.[17] While a state cannot prohibit or otherwise interfere with liquor sales on an exclusive federal reservation,[18] the Court has never held that a state cannot take appropriate steps to protect itself from diversion as a result of such sales. Nor has it held that a state cannot regulate the transportation of liquor to a concurrent jurisdiction enclave in a manner to prevent diversion of the liquor into state commerce.[19]

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current bases arose again *Mississippi Tax Comm'n II*, the Court did not rely on its *Mississippi Tax Comm'n I* rationale applicable to exclusive federal enclaves but, instead, found the regulations impermissible because they imposed the legal burden of taxation on the military as the ultimate purchaser. *Mississippi State Tax Comm'n II*, 421 U.S. at 606-11. In contrast, the North Dakota regulations do not impose the legal incidence of their burden on the federal military, but solely on the out-of-state suppliers.

[17] *See Crisp*, 467 U.S. at 713; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *cf. 324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 729 (1987) (absence of an asserted state interest in preventing diversion undercuts the force of that state's authority under the Twenty-First Amendment).

[18] *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

[19] In fact, this Court's precedents support such regulatory power, as illustrated by the *dicta* in *Mississippi Tax Comm'n I*:

> Certainly [the lower court] was correct when it further observed that "as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State

In fact, the Court has recognized that a state could adopt regulations preventing diversion of the liquor in transit to an exclusive enclave, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1964),[20] or off any military base after sale, *Mississippi Tax Comm'n I*, 412 U.S. at 378. North Dakota's regulations do nothing more than this. They do not prohibit or otherwise interfere with liquor sales on a federal reservation and are narrowly tailored to meet only permissible ends: preventing the diversion of liquor into the state.[21]

Uncontradicted evidence in the record demonstrates that North Dakota was seriously concerned about the problem of diversion of liquor from military reservations.[22] Had

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> of Mississippi, even where the consumption or other use of the liquor was consummated within the territorial confines of the base."

412 U.S. at 380 (quoting *United States v. State Tax Comm'n of Miss.*, 340 F. Supp. 903, 907 (S.D. Miss. 1972)).

[20] "We may assume that if in *Collins* [*v. Yosemite Park & Curry Co.*] California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park [an exclusive federal enclave], *in the interest of preventing unlawful diversion into her territory*, California would have been constitutionally permitted to do so." 377 U.S. at 333 (emphasis added).

[21] The closest factual analogy is *Mississippi Tax Comm'n I*, 412 U.S. at 377, which involved state taxes on liquor sold by out-of-state distributors to the military for resale in military bases inside the state. There, this Court stated:

> [A] State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control . . . shipments [through the State to a federal enclave] insofar as necessary to prevent the "unlawful diversion" of liquor "into the internal commerce of the State."

Id. (quoting *Hostetter*, 377 U.S. at 333).

[22] *See* Affidavit of State Treasurer R. Hanson ¶ 10 (reprinted as Appendix C). As the alcohol control official for North Dakota,

it chosen to do so, North Dakota could have adopted more drastic measures: searches of persons leaving military reservations, outside the gates of the reservations, or possible surveillance of cars at the package stores to prevent the illegal diversion of package store liquor into state commerce.[23] Rejecting such draconian measures, North Dakota instead adopted modest labelling and reporting requirements to accommodate its interests and those of the federal government. Its actions reflect the lawful exercise of state power under the Twenty-First Amendment.

Mr. Hanson had apprised himself of the diversion problems associated with military posts in other states. *Id.*

[23] *See Maryland v. Barry*, 604 F. Supp. 495 (D.D.C. 1985) (reciting factual background of attempts by Maryland and Virginia to enforce their state liquor laws by surveillance of D.C. liquor stores, including arrests once a person purchasing liquor crossed the border from the District into the neighboring states).

CONCLUSION

North Dakota's regulation of liquor destined for military package stores and clubs is a carefully constructed program designed to ensure that sales of liquor on military posts do not become an open back door through which unregulated liquor floods the state. This regulatory program is not preempted by any federal action; indeed, the federal regulations themselves indicate that illegal diversion concerns must be given due weight in administering the federal package store program. The decision below failed to recognize and give deference to legitimate state concerns protected under the "core powers" of Section 2 of the Twenty-First Amendment. Because of the importance of this case to the proper interpretation of the Twenty-First Amendment, the Court should note probable jurisdiction and reverse the judgment below.

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APPENDICES

APPENDIX A

This case involves § 2 of the Twenty-First Amendment to the United States Constitution.

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Pursuant to that authority, North Dakota has adopted two regulations at issue in this case.

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

N. Dak. Admin. Code § 84-02-01-05(1)

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in the form or manner prescribed and approved by the state treasurer.

N. Dak. Admin. Code § 84-02-01-05(7)

The military procurement law appears at 10 U.S.C. § 2488(a)(1) (Supp. IV 1986)

> (a) The Secretary of Defense shall provide that—(1) covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered, ...

Pursuant to other regulatory authority, 50 U.S.C. app. § 473 (1982 & Supp. III 1985), the Secretary of Defense has adopted the following regulations concerning liquor purchases for resale in military package stores.

> Procedures and guidance [for clubs and military package stores] are prescribed in DoD [Reg.] 1015.3-R, ... Chapter 4, section C., of this guidance reads as follows:
>
> > "C. *COOPERATION*. The [DoD] shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors.[1] These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state."

32 C.F.R. § 261.4 (1987).

As noted in the text of § 261.4, the regulation codified at 261.4 forms part of a larger group of regulations involving military clubs and package stores. An uncodified

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[1] As it appears in C.F.R. The source for this regulation, DoD 1015.3-R, ch. 4, ¶ C, has been changed to read "price and other factors considered." DoD Change No. 1 for DoD 1015.3-R (Feb. 8, 1983). Notwithstanding this change, the C.F.R. text contains the original word order. The differing word order does not appear to change the meaning of the provision.

part of DoD 1015.3-R, ch. 4, is also relevant to this case.

> 3. *Diversion*. Packaged alcoholic beverage sales outlets are operated solely for the benefit of authorized purchasers. Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements.

DoD 1015.3-R, ch. 4, ¶ F3 (1982).

APPENDIX B

State Limits on Importation of Liquor [1] for Personal Use

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
A. States Prohibiting Importation of Liquor for Personal Use		
Arkansas	Ark. Code Ann. § 3-3-205(b & c) (1987)	possession of liquor obtained not in conformity with provision of the Act is a misdemeanor even if for personal use
	Id. § 3-3-216(a) (1987 & Supp. 1987)	unlawful to possess alcohol upon which Arkansas tax has not been paid
	Id. § 3-7-106(a) (1) (1987)	any importation of liquor into the State can only occur with a permit from the Commissioner of Revenues showing taxes have been paid. Only licensed wholesalers may obtain a permit to import
Louisiana	La. Rev. Stat. Ann. Title 26 § 142 (West Cum. Supp. 1988)	importation only by those with wholesaler's permit

[1] The terms liquor and alcohol, as used in this chart, refer only to those beverages that are 21% or greater alcohol by volume.

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
A. States Prohibiting Importation of Liquor for Personal Use (cont'd)		
Mississippi	Miss. Code Ann. § 97-31-47 (1972)	unlawful for any person to transport into the state any liquor for private use
North Dakota	N.D. Admin. Code § 84-02-01-05(2) (1986)	all liquor must be shipped to licensed wholesalers
Wisconsin	Wis. Stat. Ann. § 125.06 (West 1988)	does not exempt individuals importing for personal use from requirement of license and/or permit
	Id. § 125.58	requires out-of-state shippers to ship only to permit holders. The only exception is for wine
	Id. § 125.68(10) (a-b)	shipments into state allowed only if consigned to permit holder. The only exception is for certain wine purchases
	Id. § 139.03(5) (a)	may import liquor as part of household goods during a move into the state

B. States Permitting Importation of Liquor for Personal Use Provided State Tax/Fee Paid		
Alabama	Ala. Code § 28-3A-25(a) (1986)	forbids importation except as allowed by ABC Board
	Ala. Admin. Code r. 20-X-8.05 (1988)	personal importation or direct shipment of alcohol from another state or abroad allowed only with prior written approval from Alabama Alcoholic Bev. Control Board. Tax must be paid
Kentucky	Ky. Rev. Stat. Ann. § 243.720 (Michie/Bobbs-Merrill Cum. Supp. 1988)	imposes tax on use, sale, or distribution by gift of all alcohol
Massachusetts	Mass. Ann. L. ch. 138, § 22A (Law. Co-op. 1981)	may import liquor only if the liquor was a gift or if it accompanies household goods; must obtain permit. Fee charged for permit
Pennsylvania	Pa. Stat. Ann. tit. 47, § 4-491(2, 8 & 11) (Purdon 1969 & Cum. Supp. 1988)	importation of over 1 gallon subject to markup by the Board and State taxes. U.S. Armed Forces and their dependents may import one gallon from package stores
	40 Pa. Code § 9.51-9.52 (1978)	All importers must file an application; if seeking to import more than 1 quart, the application must be given under oath. Service charge imposed for permit

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
B. States Permitting Importation of Liquor for Personal Use Provided State Tax/Fee Paid (cont'd)		
Pennsylvania (Cont'd)	40 Pa. Code § 9.81-9.83 (1978)	1 gallon from abroad with evidence of personal purchase; in excess of 1 gallon must pay tax
Tennessee	Tenn. Code Ann. § 39-6-909, -911 (1982 & Cum. Supp. 1988)	no personal importation without paying Tenn. Revenue Tax. If tax paid, personal imports up to 5 gallons
	Id. § 39-6-910(6)	federal standard 1 liter/4 liters for imports from outside the U.S.
Texas	Tex. Alco. Bev. Code Ann. § 107.07(a & c) (Vernon 1978 & Cum. Supp. 1988)	Once every 30 days a person without a permit may import: 1 quart liquor (if a resident or a member of U.S. Armed Forces stationed in Texas), 1 gallon liquor (if a non-resident); Texas tax must be paid. The importer must accompany the liquor.
Washington	Wash. Rev. Code Ann. § 66.12.110 (1985)	tax-free from abroad, the federal limit (1 liter/4 liters)
	Id. § 66.12.120	from another State: reasonable amount only if markup and tax paid
	Wash. Admin. Code § 314-68-050 (1986)	Prior authorization from State Board required before importation from other State

B-4

C. States Permitting Tax-Free Importation of Liquor for Personal Use but only from Abroad [2]		
Arizona	Ariz. Rev. Stat. Ann. § 4-244.02 (1988)	personal importation of liquor allowed only from abroad in amount of 1 liter/4 liters, tax-free in 31-day period
Kansas	Kan. Stat. Ann. § 41-104 (1987 Cum. Supp.)	interstate importation only by licensed distributors
	Id. § 41-407(a) (1-2) (1986)	requires all liquor to have stamps required by law and prohibits evasion of State tax
	Id. § 41-501(b) (2) (1986 & Cum. Supp. 1987)	allows person returning from outside U.S. to import 1 gal (or metric equiv.) from outside the U.S., tax-free
Michigan	Mich. Comp. Laws Ann. § 436.3(1-2) (West 1978 & Cum. Supp. 1988)	federal limit from abroad if the adult has been out of the U.S. over 48 hours and has not brought liquor into the U.S. within the preceding 30 days

B-5

[2] Under federal law, a returning U.S. resident may import, tax-free one quart of liquor from abroad and one gallon from the U.S. Virgin Islands, Guam, or American Somoa. 19 U.S.C. § 1202 Tariff Schedule item 813.30. (The metric equivalents of 1 liter/4 liters often apply to foreign goods.) This federal limit has been adopted by several states.

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
C. States Permitting Tax-Free Importation of Liquor for Personal Use but only from Abroad (cont'd)		
South Carolina	S.C. Code Ann. § 12-33-60 (Law. Co-op. 1976)	from abroad: individuals may import up to $20 worth of liquor, tax-free
	Id. § 61-7-60	interstate: only registered producers may import
Utah	Utah Code Ann. § 32A-12-14 (1986)	1 liter liquor from abroad
D. States Permitting Tax-Free Importation of Liquor for Personal Use from Other States or Abroad		
Alaska	Alaska Stat. § 04.11.010 (1986)	Generally, a license is required to trade in liquor
	Alaska Att. Gen. Op., June 24, 1953	reasonable amount of liquor imported for personal use allowed. State liquor control laws do not apply to such imports
California	Cal. Bus. & Prof. Code § 23661 (Deering 1976 & 1988)	Reasonable amount may be imported from without U.S. by any person arriving on a common carrier; if returning by non-common carrier or as a pedestrian can only import federal limit (1 liter/4 liters)

California (Cont'd)	*Id.* § 23661.1	U.S. Armed Forces personnel returning from overseas may import such quantity as is exempt from duty under Federal Tariff Act. Importation by any other person if arriving in State on chartered airplane which commenced flight in U.S. and did not leave U.S. during flight—1 quart without license
Colorado	Colo. Rev. Stat. § 12-47-126(3) (1985)	Adult returning from abroad may have up to one gallon or 4 liters of liquor without excise liability for tax
	1 Colo. Code Regs. § 47-127.3 (1988)	Persons returning from another state may also have 1 gallon or 4 liters tax free
Connecticut	Conn. Gen. Stat. Ann. § 12-436 (West 1983 & Cum. Supp. 1988)	The state does not regulate the importation of four gallons or less accompanying a person returning to the state; importation of five gallons during any 60-day period for personal use allowed but tax must be paid
Delaware	Del. Code Ann. tit. 4, § 501(c) (1975)	interstate or from abroad 1 liter/4 liters per day by adult for personal or family/guest use without tax or permit
Florida	Fla. Stat. Ann. § 562.15(2) (1987)	1 gallon liquor, tax-free without license

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
D. States Permitting Tax-Free Importation of Liquor for Personal Use from Other States or Abroad (cont'd)		
Florida (Cont'd)	*See also* Fla. Admin. Code Ann. r. 7A-4.010 (1988)	
	See also id. r. 7A-4.028 (1986)	
Georgia	Ga. Code Ann. § 3-3-8 (1982 & Cum. Supp. 1988)	not in excess of ½ gallon liquor, tax-free
Hawaii	Haw. Rev. Stat. § 281-33 (1985)	up to 1 gallon liquor without license
Idaho	Idaho Code § 23-610 (1977)	allows individual to posses 2 quarts without State tax seal; thus, impliedly allows imports of 2 quarts
Illinois	Ill. Ann. Stat. ch. 43, ¶ 95.16 (Smith-Hurd 1986)	allows interstate import of one gallon per year by defining any person importing in excess of 1 gallon as an "Importing distributor"
	Id. ch. 43, ¶ 115 (Smith-Hurd 1986 & Cum. Supp. 1988)	require Importing distributors to obtain a license

Illinois (Cont'd)	*Id.* ch. 43, ¶ 158	imposes tax on Importing distributor
	Id. ch. 43, ¶ 183	penalizes importation without license
Indiana	Ind. Code Ann. § 7.1-1-2-3(b) (West 1982)	possession for personal use subject to legal restriction
	Id. § 7.1-5-11-1	no importation unless person specifically authorized
	Id. § 7.1-5-11-15	any person may bring in 1 quart liquor; all other importation without permit forbidden
Iowa	Iowa Code Ann. § 123.22 (West 1987)	importation of 1 quart of liquor from other States, and 1 gallon of liquor personally obtained outside the U.S.
Maine	Me. Rev. Stat. Ann. tit. 28A, § 2075(1)(A) (Supp. 1988)	no more than 4 quarts inter-state by individual
Maryland	Md. Alco. Bev. Code Ann. § 3(a)(2)(ii-iv) (1987 & Cum. Supp. 1988)	individual may personally bring in no more than 1 quart each visit, tax-free and not exceeding 2 quarts per month but can possess 4 quarts. Can import 1 gallon tax-free from U.S. Virgin Islands, Am. Samoa, or Guam and no more than 1 gallon from abroad

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
D. States Permitting Tax-Free Importation of Liquor for Personal Use from Other States or Abroad (cont'd)		
Maryland (Cont'd)	*Id.* § 4(b)(3) & (d)	person becoming Maryland domiciliary may import his/her private stock for personal consumption. Must obtain permit
Minnesota	Minn. Stat. Ann. § 297C.09 (West Cum. Supp. 1988)	1 liter from another state, tax-free; 4 liters from abroad, tax-free
	Id. § 340A.302(1)	licenses required for all other imports for personal use
Missouri	Mo. Ann. Stat. § 311.410 (Vernon 1959)	personal importation of 5 gallons, tax-free
Montana	Mont. Code Ann. § 16-6-301(2) (1987)	no personal importation exceeding 3 gallons of alcoholic beverage from abroad or inter-state
Nebraska	Neb. Rev. Stat. § 53-164.01 (1984)	no direct shipment by out-of-state suppliers to Nebraska person that does not hold Neb. distributor license

Nebraska (Cont'd)	*Id.* § 53-175	unlawful to possess liqour from person not duly licensed to handle liquor under the act
	Id. § 53-176	no delivery to unauthorized persons
	Id. § 53-194.03	forbids importation in excess of one gallon each time, and no more than two gallons per month
Nevada	Nev. Rev. Stat. Ann. § 369.490.2 (Michie 1986)	inter-state: 1 gallon liquor per month from abroad: 1 liter/4 liters
New Hampshire	N.H. Rev. Stat. Ann. § 175:14 (1955)	3 quarts without permit and not to exceed 3 gallons with permit
New Jersey	N.J. Rev. Stat. Ann. § 33:1-2(a) (West 1940 & Cum. Supp. 1988)	2 quarts liquor within consecutive 24 hour period or with special permit; importation without permit allowed only from states giving liquor purchased in N.J. reciprocal treatment
New Mexico	N.M. Stat. Ann. § 60-7A-3(D) (1978)	reasonable amount for personal use
New York	N.Y. Alco. Bev. Cont. Law § 102(1)(c) & (e) (McKinney 1987)	personal importations for personal use from outside the U.S. and prohibits all other imports (even for personal use)

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
D. States Permitting Tax-Free Importation of Liquor for Personal Use from Other States or Abroad (cont'd)		
New York (Cont'd)	*See also* 1970 N.Y. Laws ch. 242 § 1, and Legislative Memoranda, 1970 N.Y. Laws at 2868 (McKinney)	
	N.Y. Tax Law § 420(14)	defines "noncommercial importer"
	Id. § 424(1) & (2)	levies taxes on noncommercial importers
	Id. § 424(4)	1 quart (or 1 gallon if a person is returning from Am. Samoa, Guam, or the U.S. Virgin Islands) accompanying a person returning to N.Y. is exempt from tax. If entering N.Y. from outside the U.S. the person must have been abroad for 48 hours or more. Impliedly allows personal imports from other States
		But see People v. Ryan, 274 N.Y. 149, 8 N.E.2d 313 (1937) (holding that then § 102(1)(d) does not apply to imports for personal consumption.) The 1970 amendments to § 102(1)(e) and the N.Y. Tax Law calls into question the continuing validity of *Ryan*

North Carolina	N.C. Gen. Stat. § 18B-402 (1983)	4 liters liquor
Ohio	Ohio Rev. Code Ann. § 4301.20(K) (Anderson 1982)	1 quart, tax-free, from abroad or another state during any 30 day period
	Ohio Admin. Code § 4301-3-01(C) (1986)	1 gal of liquor tax-free from abroad; consent of Department of Liquor Control required
Oklahoma	Okla. Stat. tit. 37, § 537(4) (1988)	not more than 1 liter of liquor, tax-free
Oregon	Or. Rev. Stat. § 471.405(4) (1983)	4 liters of liquor
Rhode Island	R.I. Gen. Laws § 3-1-1 (1987)	defines "import" as bringing into the State liquor in excess of 3 gallons
	Id. § 3-4-1	A person wishing to "import" liquor must place an import order with the State Liquor Control Admin
South Dakota	S.D. Codified Laws Ann. § 35-4-66(4) (1986)	1 gallon liquor

State	Statutory & Regulatory Provisions	Liquor Amount Permitted
D. States Permitting Tax-Free Importation of Liquor for Personal Use from Other States or Abroad (cont'd)		
Vermont	Vt. Stat. Ann. tit. 8, § 63(a) (1972)	May import 8 quarts liquor in own vehicle or in actual possession without permit. All other imports through state board. Vt. Regs. require the importation be for personal use
Virginia	Va. Code Ann. § 4-84(d) (i-ii) (1983)	1 gallon or 4 liters liquor
West Virginia	W.Va. Code § 60-6-6, -12 (1984)	10 gallons liquor; transportation in excess of 1 gallon requires a permit
Wyoming	Wyo. Stat. § 12-3-101(d) (1986)	3 liters, tax-free
E. Other U.S. Jurisdictions		
District of Columbia	D.C. Code Ann. § 25-137(a-b) (1981)	up to 1 gallon liquor; up to 1 quart if delivered by common carrier

APPENDIX C

Extract from the Affidavit of Robert E. Hanson, State Treasurer of North Dakota, *United States v. North Dakota*, 675 F. Supp. 555 (D.N.D. 1987) (No. A1-86-212).

• • • •

10. I am a member of the National Conference of State Liquor Administrators. Within that organization, I chair the task force on military alcohol procurement. Additionally, I am a representative of the National Coalition on Alcoholic Beverage Procurement. Through these organizations, I have learned that unlawful diversion of liquor from military bases and related abuses have occurred in other states. Specifically, I am familiar with the following acts of unlawful diversion and misconduct that are contrary to state or federal alcohol beverage control laws and exemplify the types of misconduct that North Dakota's liquor regulations under attack are intended to prevent:

a. Diversion of alcohol off a federal enclave in Hawaii by a dependent of a Department of Defense employee in quantities large enough to supply the dependent's own liquor store in the private sector.

b. Loss of quantities of alcohol from the time the supplier delivered the product to the Department of Defense personnel to the time when the product was to be inventoried or taken by Department of Defense personnel to another facility.

c. Purchases of alcohol is quantities so large that the only logical explanation is that the alcohol was diverted from the military base into a state's stream of commerce. This occurred in the state of Washington as documented by the Washington State Liquor Control Board's February 20, 1987,

letter to Mr. Chapman Cox, Assistant Secretary of Defense at the Pentagon in Washington, D.C. A copy of that letter is attached hereto as Attachment 1. The Washington State Liquor Control Board letter describes purchases of alcohol in quantities so large that on-base personnel would have had to individually consume 85 cases each during the fiscal year 1986. This amounts to 1,020 bottles or approximately 5 bottles per person per day, including Sundays and holidays.

• • • •

JOINT

APPENDIX

No. 88-926

In The

Supreme Court of the United States

October Term, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED DECEMBER 5, 1988
PROBABLE JURISDICTION NOTED MARCH 27, 1989

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TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 26, 1986—Plaintiff's Complaint filed in United States District Court for the District of North Dakota.

Dec. 22, 1986—Answer of Defendant State of North Dakota filed.

Jan. 23, 1987—Stipulation of Uncontested Facts, signed by Steven E. Noack and Richard A. Correa, filed.

Feb. 27, 1987—Statement of Material Facts as to Which There is No Genuine Issue filed by plaintiff.

Feb. 27, 1987—Motion for Summary Judgment, including attached Declaration of Kim Keltz, filed by plaintiff.

March 30, 1987—Motion for Summary Judgment filed by defendants.

March 30, 1987—Statement of Material Facts as to Which There is no Genuine Issue filed by defendants.

March 30, 1987—Affidavit of Robert E. Hanson, State Treasurer of North Dakota, filed by defendants.

May 1, 1987—Plaintiff's Opposition to Defendants' Motion for Summary Judgment with attached Declaration of Bernard Marcak filed.

May 18, 1987—Affidavit of Robert E. Hanson filed by defendants (attached to Defendants' Response to Plaintiff's April 30, 1987, Memorandum in Support of its Opposition to Defendants' Motion for Summary Judgment and in Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment).

June 24, 1987—District Court's Memorandum and Order filed. (The Memorandum and Order are reproduced in the Jurisdictional Statement at A23-A32.)

June 24, 1987—District Court's Judgment with Notice of Entry endorsed thereon filed. (The Judgment with Notice of Entry is reproduced in the Jurisdictional Statement at A33-A34.)

July 23, 1987—Notice of Appeal to the United States Court of Appeals for the Eighth Circuit filed by plaintiff.

Sept. 9, 1988—Decision of the United States Court of Appeals for the Eighth Circuit entered. (A copy of the decision of the United States Court of Appeals for the Eighth Circuit is reproduced in the Jurisdictional Statement at A1-A22.)

Sept. 9, 1988—Judgment of the United States Court of Appeals for the Eighth Circuit entered.

Nov. 16, 1988—Notice of Appeal to the United States Supreme Court filed by defendants. (The Notice of Appeal is reproduced in the Jurisdictional Statement at A35-A36.)

April 3, 1989—Mandate entered on the clerk's records by District Court Judge Patrick A. Conmy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. STATE OF NORTH DAKOTA; ROBERT E. HANSON, State Treasurer of North Dakota, Defendants	)	CIVIL ACTION No. ——— (Filed Nov. 26, 1986)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The plaintiff, the United States of America, by its undersigned attorneys, complains and alleges as follows:

1. This is a civil action instituted by the United States for the purpose of obtaining (1) a declaratory judgment that North Dakota's interference with the out-of-state purchase of alcoholic beverages by the military and the North Dakota regulations which require that all liquor purchased by the military which is not purchased through licensed North Dakota wholesalers be identified as exclusively for consumption within a federal enclave and that all liquor purchased out of state by the military and brought or sent into North Dakota must be reported to the State, violate the Supremacy Clause of the United States Constitution; and (2) preliminary and permanent injunctions prohibiting the defendants and those acting in concert with them from enforcing the regulations and from otherwise interfering with or attempting to regulate the

direct purchase of alcoholic beverages by the military from out-of-state producers or suppliers.

2. This action is brought by the United States under the direction of the Attorney General of the United States, at the request of the Department of the Air Force, to protect the sovereign rights and pecuniary interests of the United States.

3. Jurisdiction over this action is conferred upon this Court by virtue of the provisions of Sections 1331, 1345 and 2201 of Title 28, United States Code, for the reason that this is an action arising under the United States Constitution brought by the United States to obtain a declaratory judgment regarding the interests of the United States and to obtain injunctive relief.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States and the defendants concerning their respective rights and obligations. The plaintiff is suffering actual and threatened harm by virtue of the actions of the defendants.

5. The plaintiff, the United States of America, is a corporate sovereign and body politic.

6. The defendant, the State of North Dakota, is a body politic and is named as a defendant because this action concerns the application of its alcoholic beverage control regulations and implementation thereof by its officials.

7. The defendant, Robert E. Hanson, who is sued in his official capacity, is the State Treasurer of North Dakota and as such is responsible for the enforcement of North Dakota's alcoholic beverage control laws and regulations.

8. The clubs and package goods stores located on military installations in North Dakota are non-appropriated fund instrumentalities of the Federal Government. They purchase quantities of alcoholic beverages, including liquor. Department of Defense Armed Services Military Club and Package Store Regulation, DOD 1015.3-R, 32 C.F.R., Section 261.4 (1983) requires that the military clubs and package goods stores purchase alcohol at the best available price. Prices for liquor purchased by the military directly from out-of-state distillers are significantly lower than for liquor purchased from licensed wholesalers within the State.

9. A North Dakota regulation, N.D. Admin. Code, Title 5, Sec. 84-02-02-05 requires that all liquor delivered to a federal enclave in North Dakota which is not transported through a licensed North Dakota wholesaler shall be identified as for consumption exclusively within the federal enclave. The regulation provides that the identification must be in a form and manner prescribed and approved by the State Treasurer. Under this regulation all liquor sold by out-of-state distillers, producers or suppliers to the military clubs and package goods stores located in North Dakota must be marked with labels indicating that the liquor is for consumption exclusively within a federal enclave.

10. A North Dakota regulation, N.D. Admin. Code, Title 5, Sec. 84-02-01-05 requires that all persons sending or bringing liquor into North Dakota shall file a report of all shipments and returns with the State Treasurer. Under this regulation shippers of liquor sold by out-of-state distillers, producers or suppliers to the military clubs and

package goods stores located in North Dakota must file periodic reports with the State.

11. Section 84-02-02-05 and Section 84-02-01-05 became effective on January 1, 1986, but were not implemented because for fiscal year 1986 Congress required the military to purchase alcoholic beverages within the state in which the military installation purchasing the alcohol was located. Congress recently approved legislation reauthorizing the purchase by the military of alcoholic beverages other than wine and malt beverages from out of state, Pub. L. No. 99-591, Section 9090 (Oct. 30, 1986), Pub. L. No. 99-661, Section 313 (Nov. 14, 1986).

12. On October 28, 1986, the defendant, State Treasurer Hanson, wrote letters to out-of-state liquor manufacturers and suppliers claiming that direct shipments of alcohol to Department of Defense installations in North Dakota would circumvent existing state law and control mechanisms by not going through legally licensed wholesalers. The letter notified the manufacturers and suppliers of a meeting to explain the State's labeling and reporting requirements for direct sales to the military installations and highly recommended their attendance. The meeting was held in the State Capitol on November 5, 1986.

13. By letter dated November 6, 1986, Kobrand Corporation informed the Air Force of price increases of between $.85 and $20.50 per case for the additional costs of affixing a North Dakota tax stamp to each bottle of liquor.

14. By letter dated November 7, 1986, Hiram Walker & Sons, Inc., informed the Air Force Non-Appropriated Fund Purchasing Office that it would not honor Air Force

purchase orders for liquor for North Dakota military installations. Heublein, Inc., James B. Beam, Joseph Seagrams and Somerset Importers have also informed the Air Force that they will not honor purchase orders for liquor for North Dakota military installations.

15. The Air Force estimates that the additional cost of purchasing liquor from in-state wholesalers would be approximately $50,000 for the period of November 21 to December 31, 1986, and about $200-250,000 per year thereafter.

16. The North Dakota regulations, N.D. Admin. Code, Title 5, Secs. 84-02-02-05 and 84-02-01-05 interfere with the purchase of liquor by the United States military and conflict with a federal regulation, DOD 1015.3-R, 32 C.F.R., Section 261.4 (1983), in violation of the Supremacy Clause of the United States Constitution.

WHEREFORE, the plaintiff, the United States of America, prays as follows:

1. That this Court enter a judgment declaring that North Dakota's interference with the out-of-state purchase of alcoholic beverages by the military and N.D. Admin. Code, Title 5, Sec. 84-02-02-05, which requires the identification of liquor not purchased through licensed North Dakota wholesalers as exclusively for consumption within a federal encalve and N.D. Admin. Code, Title 5, Sec. 84-02-01-05, which requires liquor purchased out of state by the military and brought or sent into North Dakota must be reported to the State, conflict with a federal regulation, DOD 1015.3-R, Department of Defense regulation, 32 C.F.R., Section 261.4 (19831), and violate the Supremacy Clause of the United States Constitution.

2. That this Court enter preliminary and permanent injunctions in favor of the plaintiff, the United States of America, enjoining the defendants, their employees, agents, attorneys, and all those acting in concert with them who shall receive notice of the injunctions sought herein, from enforcing or implementing North Dakota Admin. Code, Title 5, Secs. 84-02-02-05 and 84-02-01-05 with respect to out-of-state purchases of alcoholic beverages by the military or in any other way prohibiting or interfering with the direct out-of-state purchase of liquor by the United States military for its clubs and package stores located in North Dakota.

3. That this Court grant the plaintiff its costs in this action and such other and further relief as is just, equitable and proper.

DATED: November 25, 1986.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

ANSWER

Filed Dec. 22, 1986

[Caption Omitted in Printing]

. . . . . .

COMES NOW, the defendants, State of North Dakota and Robert E. Hanson, State Treasurer of North Dakota, and for their answer to plaintiff's Complaint, state as follows:

I.

Defendants deny all allegations of plaintiff's Complaint except as hereafter admitted, qualified, or explained.

II.

With respect to paragraph 1 of plaintiff's Complaint, defendants admit the plaintiff's description of its action but deny the assertion that North Dakota is interfering with the military's out-of-state purchases of alcoholic beverages. The defendants further deny that North Dakota's regulations violate the Supremacy Clause of the United States Constitution.

III.

Defendants admit paragraphs 3, 5, 6, and 7 of plaintiff's Complaint.

IV.

With respect to paragraph 8 of plaintiff's Complaint, defendants admit that clubs and package goods stores lo-

cated on military installations in North Dakota are non-appropriated fund instrumentalities of the federal government that purchase alcoholic beverages for resale. The statement in paragraph 8 relating to Department of Defense Armed Services Military Club and Package Store Regulation, DOD 1015.3-R, 32 C.F.R., Section 261.4 (1983) sets forth a legal allegation for which responsive pleading is not required and defendants expressly deny the plaintiff's interpretation of the cited authority. The defendants have insufficient information or knowledge to admit or deny the assertion in paragraph 8 that prices for liquor purchased by the military directly from out-of-state distillers are significantly lower than liquor purchased from licensed wholesalers within the State.

V.

With respect to paragraph 9 of plaintiff's Complaint, defendants admit that the State Treasurer lawfully promulgated N.D. Admin. Code § 84-02-02-05 but deny the plaintiff's interpretation of the regulation as set forth in paragraph 9.

VI.

Defendants have insufficient information or knowledge to admit or deny paragraphs 2, 13, 14, and 15 of plaintiff's Complaint.

VII.

Paragraphs 10 and 11 set forth legal allegations for which responsive pleading is not required and defendants therefore deny the same. Defendants further state that the cited statutory and regulatory provisions speak for themselves.

VIII.

With respect to paragraph 12 of plaintiff's Complaint, defendants admit that on October 28, 1986, the State Treasurer wrote letters to out-of-state liquor manufacturers but deny that the plaintiff's characterization of that letter in Paragraph 12 is accurate.

IX.

Defendants deny paragraphs 4 and 16 of plaintiff's Complaint.

X.

Defendants state that plaintiff's Complaint fails to state a claim upon which relief may be granted.

WHEREFORE, the defendants, State of North Dakota and Robert E. Hanson, State Treasurer of North Dakota, pray as follows:

1. That this court enter a judgment declaring that North Dakota's lawfully enacted regulations concerning alcoholic beverages destined for military enclaves in North Dakota, N.D. Admin. Code §§ 84-02-02-05 and 84-02-01-05, do not conflict with federal regulation nor violate the Supremacy Clause of the United States Constitution and are lawful regulations authorized by the Twenty-first Amendment of the United States Constitution necessary to prevent the unlawful diversion of alcohol from military enclaves into the internal commerce of North Dakota.
2. That this court deny the injunctive relief requested by the plaintiff, the United States of America, enjoining the state of North Dakota and its State Treasurer, Robert E. Hanson, from

enforcing or implementing N.D. Admin. Code §§ 84-02-02-05 and 84-02-01-05 with respect to the regulation of alcoholic beverages destined for military enclaves in North Dakota.

3. That this court grant the defendants its costs in this action and such other and further relief as is just, equitable and proper.

Dated this 19th day of December, 1986.

State of North Dakota
Nicholas J. Spaeth
Attorney General

BY: /s/ Steven E. Noack
Steven E. Noack
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, North Dakota 58505

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STIPULATION

Filed Jan. 23, 1987

[Caption Omitted in Printing]

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff, the United States of America and the defendants, the State of North Dakota and Robert E. Hanson, State Treasurer of North Dakota, through their respective counsel, that:

1. The plaintiff, the United States of America, is a corporate sovereign and body politic.

2. The defendant, the State of North Dakota, is a body politic and has been named as a defendant because this action concerns the application of its alcoholic beverage control regulations and implementation thereof by its officials.

3. The defendant, Robert E. Hanson, who has been sued in his official capacity, is the State Treasurer of North Dakota and as such is responsible for the enforcement of North Dakota's alcoholic beverage control laws and regulations.

4. The clubs and package goods stores located on military installations in North Dakota are nonappropriated fund instrumentalities of the Federal Government. They purchase quantities of alcoholic beverages, including liquor. The purchase of alcoholic beverages by the military is regulated by Department of Defense Armed Ser-

vices Military Club and Package Store Regulation, DOD 1015.3-R, 32 C.F.R., Section 261.4 (1983) which provides that:

> • • • the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

5. A North Dakota regulation issued by the State Treasurer effective January 1, 1986, N.D. Admin. Code, Title 5, Sec. 84-02-02-05(7) provides that:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the State Treasurer.

6. A North Dakota regulation issued by the State Treasurer effective January 1, 1986, N.D. Admin. Code, Title 5, Sec. 84-01-01-05(1) provides that:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A report of all shipments and returns for each calendar month with the State Treasurer. The report must be postmarked on or before the fifteenth day of the following month.

7. For the period December 19, 1985 to October 29, 1986, the U.S. military was required by law to purchase alcoholic beverages in the state in which the military installation purchasing the alcohol was located. Pub. L. No. 99-190, Section 1099 (Dec. 19, 1985). The military is now authorized by law to purchase alcoholic beverages other than wine and malt beverages from sources outside the state in which the military installation purchasing the alcohol is located. Pub. L. No. 99-591, Section 9090 (Oct. 30, 1986), Pub. L. No. 99-661, Section 313 (Nov. 14, 1986).

8. By letter dated October 28, 1986, (a copy of which is attached hereto as Exhibit A) the defendant, State Treasurer Hanson, notified out-of-state liquor manufacturers and suppliers that he had "scheduled a meeting for all suppliers who have sold or may contemplate selling spirits direct to Department of Defense installations within the borders of North Dakota." A meeting of out-of-state suppliers took place in the State Capitol in Bismarck, North Dakota on November 5, 1986.

9. By letter dated November 6, 1986, (a copy of which is attached hereto as Exhibit B), Kobrand Corporation informed the Air Force of price increases of between $.85 and $20.50 per case for the additional costs of affixing a North Dakota tax stamp to each bottle of liquor.

10. By letter dated November 7, 1986, (a copy of which is attached hereto as Exhibit C) Hiram Walker & Sons, Inc., informed the Air Force Nonappropriated Fund

Purchasing Office that it was "unable to honor orders for North Dakota."

11. Neither of the U.S. military installations located in North Dakota which purchase alcoholic beverages, Minot Air Force Base and Grand Forks Air Force Base, are exclusive federal jurisdiction enclaves.

Dated: January 20, 1987

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
Steven E. Noack
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

By: /s/Steven E. Noack
Attorneys for the Defendants

RODNEY S. WEBB
United States Attorney
CHARLES S. MILLER, JR.
Assistant United States Attorney
ROGER M. OLSEN
EDWARD J. SNYDER
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By: /s/ Richard A. Correa
RICHARD A. CORREA
Attorneys for the Plaintiff,
United States of America

EXHIBIT A

[Letterhead omitted in printing]

October 28, 1986

Mr. James Neal
Compliance Manager
Heublein Inc.
2500 Enterprise Drive
Allen Park, Michigan 48101

Dear Mr. Neal:

Direct sales of spirits to Department of Defense installations has been allowed by Congress.

In previous correspondence, I informed you of our state's regulations relative to direct shipments of alcohol to a Department of Defense installation in North Dakota which would circumvent existing state law and control mechanisms by not going through a legally licensed wholesaler.

I have scheduled a meeting for all suppliers who have sold or may contemplate selling spirits direct to Department of Defense installations within the borders of North Dakota.

The meeting will be held at 1 p.m. CST, November 5, in the Peace Garden Room in the State Capitol in Bismarck, North Dakota. I will, at this meeting, explain the labelling and reporting requirements for direct sales to Department of Defense installations located within our borders. In my discussions with various manufacturers/suppliers, they have indicated they will be represented at the meeting.

I HIGHLY RECOMMEND YOUR FIRM HAVE A REPRESENTATIVE AT THIS MEETING. This meeting is designed to nip any problems in the bud. I believe working together is the best way to make progress.

I look forward to seeing you and/or your representative on November 5.

Sincerely,
/s/ Robert E. Hanson
Robert E. Hanson
State Treasurer

EXHIBIT B

[Letterhead omitted in printing]

November 6, 1986

Ms. Kim Keltz
8934 Four Winds Dr.
Suite 301
San Antonio, TX 78229

Dear Ms. Keltz:

Further to Mr. Herberger's letter of October 24, please find attached our current and February 1, 1987 Military Price lists for the State of North Dakota.

These new prices reflect the additional costs of a North Dakota Tax Stamp which must be affixed to each bottle.

Sincerely yours;
KOBRAND CORPORATION

/s/ Thomas R. Crippen
Thomas R. Crippen
Statistics Department
cc: RH

KOBRAND
PRICE DIFFERENTIAL FOR TAX STAMP TO MILITARY INSTALLATIONS IN NORTH DAKOTA

		Direct Price	North Dakota Direct Price	Diff.
BEEFEATERS GIN	1.75	$ 90.26	$ 91.11	.85
(both prices listed	Ltr	$109.74	$112.69	$ 2.95
are FOB warehouse)	750	$ 84.63	$ 88.38	$ 3.75
	375	$ 93.32	$102.90	$ 9.58
	200	$107.12	$127.62	$20.50
	50	$ 95.67	N/A	—

/s/ Kim Keltz

EXHIBIT C

[Letterhead omitted in printing]

November 7, 1986

Ms. Kim Keltz
AFNAFPO
Special Contracts Branch
8930 Four Winds Drive, Suite 301
San Antonio, TX 78239

Dear Kim:

I have been instructed to return the enclosed orders for North Dakota. Due to certain legalities, we are unable to honor orders for North Dakota.

If you have further questions, please call.

Sincerely yours,
HIRAM WALKER & SONS, INC.
/s/ Linda Dubbs
Linda Dubbs
Customer Service

mah
Enclosure
pc: S. Nadelberg
D. Walker

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Filed Feb. 27, 1987

[Caption Omitted in Printing]

In support of its motion for summary judgment and pursuant to Local Rule 5, the plaintiff submits the following facts to which there is no genuine issue to be tried:

1. The plaintiff, the United States of America, is a corporate sovereign and body politic. (Stip. para. 1.)[1]

2. The defendant, the State of North Dakota, is a body politic and has been named as a defendant because this action concerns the application of its alcoholic beverage control regulations and implementation thereof by its officials. (Stip. para. 2.)

3. The defendant, Robert E. Hanson, who has been sued in his official capacity, is the State Treasurer of North Dakota and as such is responsible for the enforcement of North Dakota's alcoholic beverage control laws and regulations. (Stip. para. 3.)

4. The clubs and package goods stores located on the military installations in North Dakota, Minot Air Force Base and Grand Forks Air Force Base, are nonappropriated fund instrumentalities of the Federal Government. They purchase quantities of alcoholic beverages, including

[1] All "Stip." references are to the stipulation filed by the parties on January 23, 1987.

liquor, from the most competitive source as required by federal regulation, Department of Defense Armed Services Military Club and Package Store Regulation, DOD 1015.3-R, 32 C.F.R., Section 261.4 (1983) which provides that:

> • • • the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

(Stip. para. 4, Keltz Decl., para. 1.)[2]

5. State Treasurer Robert E. Hanson issued a regulation, effective January 1, 1986, N.D. Admin. Code, Title 5, Sec. 84-02-02-05(7), which provides that:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the State Treasurer.

(Stip. para. 5.)

[2] The declaration of Kim Keltz, dated February 7, 1987, is attached to plaintiff's motion for summary judgment as Exhibit A.

6. State Treasurer Robert E. Hanson also issued a regulation, effective January 1, 1986, N.D. Admin. Code, Title 5, Sec. 84-01-01-05(1), which provides that:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A report of all shipments and returns for each calendar month with the State Treasurer. The report must be postmarked on or before the fifteenth day of the following month.

7. Although both regulations became effective January 1, 1986, they had no impact on the United States for the period December 19, 1985 to October 29, 1986, because both the Minot and Grand Forks bases purchased liquor within North Dakota since during that time the U.S. military was required by law to purchase alcoholic beverages in the state in which the military installation purchasing the alcohol was located. Pub. L. No. 99-190, Section 1099 (Dec. 19, 1985). As of October 30, 1986, the military was again authorized by law to purchase alcoholic beverages other than wine and malt beverages from sources outside the state in which the military installation purchasing the alcohol is located. Pub. L. No. 99-591, Section 9090 (Oct. 30, 1986), Pub. L. No. 99-661, Section 313 (Nov. 14, 1986). (Stip. para. 7.)

8. By letter dated October 28, 1986, (a copy of which is attached to the stipulation as Exhibit A) the defendant, State Treasurer Hanson, notified out-of-state liquor manufacturers and suppliers that he had "scheduled a meeting for all suppliers who have sold or may contemplate selling spirits direct to Department of Defense installations within the borders of North Dakota" to "explain the labeling and reporting requirements for direct sales to Department

of Defense installations." A meeting of out-of-state suppliers took place in the State Capitol in Bismarck, North Dakota on November 5, 1986. (Stip. para. 8.)

9. As a direct result of the State's action, a number of out-of-state distillers and importers of liquor who normally had made available and previously had sold their products to the North Dakota military installations declined to honor orders from those installations. (Keltz Decl., para. 2.)

10. By letter dated November 6, 1986, (a copy of which is attached to the stipulation as Exhibit B), Kobrand Corporation informed the Air Force of price increases of between $.85 and $20.50 per case for the additional costs of affixing a North Dakota tax stamp to each bottle of liquor. (Stip. para. 9.)

11. By letter dated November 7, 1986, (a copy of which is attached to the stipulation as Exhibit C) Hiram Walker & Sons, Inc., informed the Air Force Nonappropriated Fund Purchasing Office that it was "unable to honor orders for North Dakota." (Stip. para. 10.)

12. Other distillers and importers, including Heublein, Inc., James B. Beam, Joseph Seagrams and Somerset Importers informed the Air Force distilled spirits purchasing office by telephone after receiving purchase orders for liquor that they would not honor the orders because of the added administrative burdens and costs of the State's requirements. (Keltz Decl., para. 2.)

13. The Air Force estimates that its costs would have increased at least $50,000 if the purchases for November and December 1986 had been made from in-state sources

rather than directly from the distillers and importers located out of state, and that the increased costs of purchasing liquor solely within North Dakota on an annual basis would be between $200,000 to $250,000. (Keltz Decl., para. 3.)

14. Neither of the U.S. military installations located in North Dakota which purchase alcoholic beverages, Minot Air Force Base and Grand Forks Air Force Base, are exclusive federal jurisdiction enclaves. (Stip. para. 11.)

Dated: February 26, 1987.

Respectfully submitted,

RODNEY S. WEBB
United States Attorney

By: /s/ Charles Miller, Jr.
CHARLES S. MILLER, JR.
Assistant United States Attorney

ROGER M. OLSEN
EDWARD J. SNYDER
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By: /s/ Richard A. Correa
RICHARD A. CORREA

Attorneys for the Plaintiff,
United States of America

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

DECLARATION OF KIM KELTZ

Filed Feb. 27, 1987

[Caption Omitted in Printing]

I, KIM KELTZ, hereby declare and state:

1. I am the Chief of the Special Contracts Branch, Air Force Nonappropriated Fund Purchasing Office, located in San Antonio, Texas 78239. I directly manage the joint-military service consolidated purchasing program for distilled spirits. This program provides military installations of all the services in 13 states (including the two military installations in North Dakota, Grand Forks Air Force Base and Minot Air Force Base) with a method of purchasing distilled spirits from the most competitive source, whether in-state or out-of-state, in compliance with Federal law. In most cases, out-of-state purchases are made directly from distillers/importers (prime sources which provide the best prices) rather than from distributors at the wholesale level (middlemen who add additional markups).

2. During October of 1986, North Dakota notified various distillers/importers outside the State that it expects compliance with Sections 84-02-02-05(7) and 84-01-01-05(1) of the North Dakota Administrative Code with regard to sales to military installations located in the State. These regulations uniquely require the labeling and reporting of all distilled spirits purchased by military installations in North Dakota from out-of-State sources. By

letter of 28 October 1986, the North Dakota State Treasurer notified out-of-State distillers/importers of a 5 November 1986 meeting called by the State to "explain the labeling and reporting requirements for direct sales to Department of Defense installations located" in North Dakota (Attachment 1). As a direct result of the State's action, a number of the out-of-State distillers/importers which would otherwise have been available to, and had previously been used by, the military installations in North Dakota declined to honor orders from those installations. The following distillers/importers received orders and then notified me by telephone that they would not honor such orders because of the added administrative burdens and costs imposed by the State's action: Hueblein, Inc.; James B. Beam; Joseph Seagrams; and Somerset Importers. Another such source (Hiram Walker G & W Inc.) received orders and then provided written notice that it would not honor such orders (Attachment 2). One other such source (Kobrand Importers, Inc.) received orders and then advised that it had increased its prices to cover the increased costs resulting from the State's requirements. These price increases range from $.85 to $20.50 per case (Attachment 3). In addition, the timing of the State's action interfered with the processing of time-sensitive orders which were to provide merchandise for the holiday season.

3. If the military installations in North Dakota had been limited to purchasing all of their distilled spirits requirements from in-State sources, those purchases would have cost the installations involved at least $50,000 more to satisfy their requirements during November and December of 1986 than if the merchandise was purchased

from out-of-State distillers/importers. If the installations in North Dakota are forced to purchase their distilled spirits requirements from in-State sources in the future, it will cost the installations involved between $200,000 and $250,000 per year more than if the purchases are made from out-of-State distillers/importers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 7th day of February, 1987.

/s/ Kim Keltz
KIM KELTZ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Filed March 30, 1987

[Caption Omitted in Printing]

In support of its Motion for Summary Judgment pursuant to Local Rule 5, the defendants submit the following facts to which there is no genuine issue to be tried:

1. The plaintiff, the United States of America, is a corporate sovereign and body politic. *Stipulation,* paragraph 1.

2. The defendant, the State of North Dakota, is a body politic and has been named as a defendant because this action concerns the application of its alcoholic beverage control regulations and implementation thereof by its officials. *Stipulation*, paragraph 2.

3. The defendant, Robert E. Hanson, who has been sued in his official capacity, is the State Treasurer of North Dakota and as such is responsible for the enforcement of North Dakota's alcoholic beverage control laws and regulations. *Stipulation*, paragraph 3; *Hanson* Affidavit, paragraphs 1 and 2.

4. The clubs and package goods stores located on military installations in North Dakota are non-appropriated fund instrumentalities of the federal government. They purchase quantities of alcoholic beverages, including liquor. The purchase of alcoholic beverages by the military is regulated by the Department of Defense Armed Ser-

vices Military Club and Package Store Regulation, DoD 1015.3-R, (as referenced and quoted in 32 C.F.R. § 261.4 (1983)), which provides that:

> . . . "C. COOPERATION. The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state." (Quote in original.)

Stipulation, paragraph 4.

5. Neither of the United States military installations located in North Dakota which purchase alcoholic beverages, Minot Air Force Base and Grand Air Force Base, are exclusive federal jurisdiction enclaves. *Stipulation,* paragraph 11.

6. N.D. Admin. Code § 84-02-01-05(7), effective January 1, 1986, provides that:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption with the fed-

eral enclave exclusively. Such identification must be in the form and manner prescribed and approved by the State Treasurer.

Stipulation, paragraph 5.

7. N.D. Admin. Code § 84-02-01-05(1) was issued by the State Treasurer and became effective upon the initial publication of the North Dakota Administrative Code on July 1, 1978. The historical note to N.D. Admin. Code § 84-02-01-05 applies only to subdivision 7 which was the only amendment to that section at that time. The effective date of N.D. Admin. Code § 84-02-01-05(1) is inaccurately set forth in paragraph 6 of the Stipulation. N.D. Admin. Code § 84-02-01-05(1) states as follows:

> 1. All persons sending or bringing liquor into North Dakota shall file a North Dakota schedule A report of all shipments and returns for each calendar month with the State Treasurer. The report must be postmarked on or before the fifteenth day of the following month.

Stipulation, paragraph 6; *Hanson* Affidavit, paragraph 3.

8. For the period December 19, 1985, to October 29, 1986, the United States military was required by law to purchase alcoholic beverages in the state in which the military installation purchasing the alcohol was located. Pub.L. No. 99-190, Section 1099 (Dec. 19, 1985). The military is now authorized to purchase alcoholic beverages other than wine and malt beverages from sources outside the state in which the military installation purchasing the alcohol is located. Pub.L. No. 99-591, Section 9090 (Oct. 30, 1986), Pub.L. No. 99-661, Section 313 (Nov. 14, 1986). *Stipulation,* paragraph 7. Pub.L. No. 99-591, Section 9090, states, in relevant part, as follows:

> That alcoholic beverages other than wine and malt beverages in contiguous states and the District of Columbia shall be procured from the most competitive source, price and other factors considered.

9. By letter dated October 28, 1986, I notified out-of-state distillers/suppliers of a November 5, 1986, meeting to "explain the labeling and reporting requirements for direct sales to the Department of Defense installations located" in North Dakota. The meeting was held on November 5, 1986, and a number of distillers/suppliers attended, and we discussed the requirements of the regulations that are now being challenged. *Stipulation,* paragraph 8; *Hanson* Affidavit, paragraph 4.

10. Various distillers/suppliers have indicated that they intend to comply with the regulations being challenged in the present action. Some distillers/suppliers have indicated that they would rather fill orders to North Dakota military enclaves through their designated North Dakota wholesalers than by direct sales. *Hanson* Affidavit, paragraph 6.

11. By letter dated November 6, 1986, Kobrand Corporation informed the Air Force of price increases of between $.85 and $20.50 per case for the additional costs of affixing a North Dakota tax stamp to each bottle of liquor. *Stipulation,* paragraph 9. The regulation that requires labels to be affixed by out-of-state distillers/suppliers to the liquor delivered directly to the North Dakota federal enclaves, N.D. Admin. Code § 84-02-01-05(7), is a means of identifying intoxicants that are unlawfully diverted from the federal enclaves into the state's domestic commerce. The labels are not tax stamps and do not constitute an attempt to tax those items of liquor. *Hanson* Affidavit, paragraph 5.

12. There is diversion of alcoholic beverages from North Dakota federal enclaves into the state's domestic commerce in contravention of the state's established liquor distribution system. *Hanson* Affidavit, paragraph 8.

13. The Department of Defense, which is not subject to local or state laws, may permit different hours and days of operations than are legally authorized for North Dakota licensed retailers. The military has a policy of allowing the sale of liquor to individuals at a lower legal drinking age than the state where the base is located if the base is within 50 miles of a contiguous state that has a lower drinking age. *Hanson* Affidavit, paragraph 9.

14. There have been instances of unlawful diversion of alcoholic beverages from federal enclaves and related abuses throughout the United States. *Hanson* Affidavit, paragraph 10.

15. The state's interests in establishing and maintaining a liquor distribution system are to promote temperance, ensure orderly marketing conditions, and raise revenue.

Respectfully submitted this 30th day of March, 1987.

State of North Dakota
Nicholas J. Spaeth
Attorney General

By: /s/ Steven E. Noack
Steven E. Noack
Assistant Attorney General
Office of Attorney General
State Capitol
Bismarck, ND 58505

Attorneys for the Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

AFFIDAVIT OF ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA

Filed March 30, 1987

[Caption Omitted in Printing]

I, Robert E. Hanson, being first duly sworn, depose and say:

1. I am the state treasurer of the State of North Dakota. The state treasurer is a constitutionally elected officer of the state under § 12 of Art. V of the Constitution of North Dakota. The powers and duties of the state treasurer are prescribed by law.

2. Among the statutory duties of the state treasurer is the responsibility of regulating the state's liquor distribution system and ensuring orderly marketing conditions. The state's liquor distribution system embraces three tiers including (1) suppliers/distillers; (2) resident wholesalers; and (3) resident retailers. Additionally, I license the liquor and beer wholesalers in North Dakota.

3. On January 1, 1986, N.D. Admin. Code § 84-02-01-05(7) became effective and has had the force of law since that date. N.D. Admin. Code § 84-02-01-05(1) has been in effect since July 1, 1978. Although N.D. Admin. Code § 84-02-01-05(7) became effective on January 1, 1986, federal law required the United States military to purchase alcoholic beverages in the state in which the military installation was located and the regulation therefore had little practical effect. On October 30, 1986, this federal

law was amended to permit the military to purchase alcoholic beverages, other than wine and malt beverages, from out-of-state sources.

4. By letter dated October 28, 1986, I notified out-of-state distillers/suppliers of a November 5, 1986, meeting to "explain the labeling and reporting requirements for direct sales to Department of Defense installations located" in North Dakota. The meeting was held on November 5, 1986, and a number of distillers/suppliers attended, and we discussed the requirements of the regulations that are now being challenged.

5. The regulation that requires labels to be affixed by distillers/suppliers to the liquor delivered to the North Dakota federal enclaves, N.D. Admin. Code § 84-02-01-05 (7), is a means of identifying intoxicants that are unlawfully diverted from the federal enclaves into the state's domestic commerce. The labels are not tax stamps and do not constitute an attempt to tax those items of liquor.

6. Various distillers/suppliers have notified me that they intend to comply with state law regarding the labeling and reporting requirements of the regulations at issue. Some distillers/suppliers have informed me that they would rather fill orders to North Dakota military enclaves through their designated North Dakota wholesalers than by direct shipments.

7. The cost of the labels is approximately 3¢ to 5¢ per label if purchased from the state treasurer. However, the distillers/suppliers may print the labels themselves as long as the format is approved by the State Treasurer's Office. The label is to be made from crack and peel paper

which is a type of paper that cannot be taken off the item on which it is affixed without tearing and leaving a portion of the paper on the item. The label is to be printed in bright colors so it can be easily identified. At the November 5, 1986, meeting I informed the distillers/suppliers that the size of the label could vary to correspond with the size of the individual container.

8. In my capacity as state treasurer in charge of regulating North Dakota's liquor distribution system, I am aware of the diversion of alcoholic beverages from North Dakota federal enclaves into the state's domestic commerce in contravention of the state's established liquor distribution system.

9. The Department of Defense, which is not subject to local or state laws, may permit different hours and days of operation than are legally authorized for North Dakota licensed retailers. The military has a policy of allowing the sale of liquor to individuals at a lower legal drinking age than the state where the base is located if the base is within 50 miles of a contiguous state that has a lower drinking age.

10. I am a member of the National Conference of State Liquor Administrators. Within that organization, I chair the task force on military alcohol procurement. Additionally, I am a representative on the National Coalition on Alcoholic Beverage Procurement. Through these organizations, I have learned that unlawful diversion of liquor from military bases and related abuses have occurred in other states. Specifically, I am familiar with the following acts of unlawful diversion and misconduct that are contrary to state or federal alcohol beverage con-

trol laws and exemplify the types of misconduct that North Dakota's liquor regulations under attack are intended to prevent:

a. Diversion of alcohol off a federal enclave in Hawaii by a dependent of a Department of Defense employee in quantities large enough to supply the dependent's own liquor store in the private sector.

b. Loss of quantities of alcohol from the time the supplier delivered the product to the Department of Defense personnel to the time when the product was to be inventoried or taken by Department of Defense personnel to another facility.

c. Purchases of alcohol is quantities so large that the only logical explanation is that the alcohol was diverted from the military base into a state's stream of commerce. This occurred in the state of Washington as documented by the Washington State Liquor Control Board's February 20, 1987, letter to Mr. Chapman Cox, Assistant Secretary of Defense at the Pentagon in Washington, D.C. A copy of that letter is attached hereto as Attachment 1. The Washington State Liquor Control Board letter describes purchases of alcohol in quantities so large that on-base personnel would have had to individually consume 85 cases each during the fiscal year 1986. This amounts to 1,020 bottles or approximately 5 bottles per person per day, including Sundays and holidays.

11. This state's interests in establishing and maintaining a liquor distribution system are to promote temperance, ensure orderly marketing conditions, and raise revenue.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 30th day of March, 1987.

/s/ Robert E. Hanson
Robert E. Hanson

(SEAL)
Subscribed and sworn to before me this
30th day of March, 1987.
/s/ Janet R. Franklund
Notary Public
Com. Exp. 2-5-93

ATTACHMENT 1

[Letterhead omitted in printing]

February 20, 1987

Mr. Chapman Cox
Assistant Secretary of Defense
For Force Management and Personnel
Room 3E764
The Pentagon
Washington, D.C. 20301

Dear Mr. Cox:

We are writing in an effort to head off a serious problem which appears about to occur between the State of Washington and some of its citizens who presently qualify to purchase liquor from Nonappropriated Fund Instrumentalities on military bases in this state. This problem arises from a decision made by NAF management which we do not believe is in accord with either law or Department of Defense policy.

As you are aware, the 99th Congress as part of Public Law 99-500 enacted a requirement that Nonappropriated Fund Instrumentalities ("NAF") on military bases purchase liquor, other than wine and malt beverages, "from the most competitive source, price *and other factors* considered." (Emphasis supplied.)

As a result of this congressional action, we have been advised through Mr. Bernard Marcak, Chief of the NAF Law Division, that effective March 1, 1987 the NAF outlets in Washington State have determined to cease buying liquor from the Washington State Liquor Control Board after more than thirty-three years of business in favor of purchasing it from sources outside the State of Washington.[1]

When Mr. Marcak advised us of this decision on February 11, 1987, he offered us the alternative of continued purchasing by Washington NAFs from the Board at our landed cost (with no state liquor tax paid) plus a service charge of $2.50 per case. This offer was on a take it or leave it basis. We declined the offer in view of the fact that this price would barely have covered our costs and would have meant a loss of revenue[2] of over $1.2 million per year to state and local governments (i.e., cities and counties) in Washington.[3]

We note that the prices of the new liquor when sold to military personnel by an NAF would be unchanged so that a large windfall of additional profits will go to the NAF.[4] It could not have been the intent of Congress to

---

1 With the exception of two Coast Guard facilities in Washington which are not under the Department of Defense and which have given indication that they wish to continue purchasing from the Board.

2 Based on 1986 figures, this amount was $1,249,416.00.

3 See RCW 66.08.190.

4 Because Washington has the highest liquor taxes, and hence the highest prices, in the 48 contiguous states for liquor, the NAFs in Washington have always been able to charge higher prices and consequently receive higher profits com-

(Continued on following page)

simply transfer this money from state and local governments to NAF instrumentalities through a program which necessitates and encourages the continuing violation of state law. It could only have been congressional intent that liquor sold on military bases be for consumption only on those bases *unless* removing it into the surrounding states was permitted by state law. The State of Washington is unique in that unlike most, if not all, other states Washington law contains no provision permitting importation of liquor by private persons for personal use in any quantities unless the liquor was originally purchased from the Board or a Board "authorized" source.[5]

As we advised Mr. Marcak, the State of Washington has no objection to NAF purchases of liquor from any source and the sale of it on military reservations as long as the liquor is kept, and consumed, on the military base itself. However, there are some serious legal problems which arise if any of this liquor not originally obtained from the Board should subsequently be taken off the base into the State of Washington.

Specifically, Washington State Law (RCW 66.44.160) provides as follows:

(Continued from previous page)

pared to other states. With a policy of buying direct from the distillers, however, these profits would increase dramatically. For example, in the case of an average priced 750 ml of 80 proof whiskey, the gross profit per bottle would increase from $2.21 to $3.47. This compares to approximately $1.58 per bottle made by California NAFs which currently buy direct from the distiller. See chart attached as Appendix 1.

5 Or an equivalent tax and markup are paid to the Board prior to the importation. See RCW 66.12.110 and RCW 66.12.120.

> "Except as otherwise provided in this title, any person who has or keeps or transports alcoholic beverages other than those purchased from the board, a state liquor store, or some person authorized by the board to sell them, shall be guilty of a violation of this title."

Further, RCW 66.12.030(2) provides as follows:

> "Nothing in this title shall prevent the transshipment of liquor in interstate and foreign commerce; but no person shall import liquor into the state from any other state or country, except, as herein otherwise provided, for use or sale in the state, except the board."

Since 1954, and at some bases as early as 1949, all distilled spirits sold by NAF instrumentalities on Washington military bases has been purchased from the Board free of state liquor tax and at a discount from our normal mark-up. The actual price has been negotiated from time to time. The sale of this liquor to the NAF by the Board meant it was liquor "purchased from the Board" for purposes of RCW 66.44.160. Also, the sale of it to the NAF constituted "authorization" by the Board for the NAF to resell it to Washington State residents who qualified to purchase it under Department of Defense regulations. Consequently, those qualifying purchasers could legally remove the liquor into the State of Washington. The same is *not* true of liquor obtained from some source other than the Board.

We are advised that the Department of Defense attempts to maintain a policy of cooperation with state and local authorities in the areas around military bases and that it is not official policy to encourage or promote violation of the laws of such states.

In view of these policies, we have already requested, by letter dated February 17, 1987 (copy attached) to Mr. Marcak, that the NAF package stores on Washington military bases not encourage violation of Washington State law by selling liquor in original packages to those who reside off the military base upon which the NAF is located. This can easily be implemented as identification is already required for purchase at an NAF to determine if a person is a qualified purchaser.

We are also, by copy of this letter, requesting the Base Commanders of each military base in Washington to, after March 1, implement a *bona fide* program of restricting sales to those who actually will consume the liquor on the base.[6] We are *not* asking that simply signs be put up advising purchasers of what Washington law is. We are asking that sales be restricted to those who will consume the liquor on the base and that any information concerning purchases of liquor for consumption off the base be brought to the attention of state authorities so that appropriate enforcement action may be undertaken. We would also request the assistance of the military police to our enforcement division where appropriate.

If the commanders of the bases on which the NAFs are located were to simply "wink" at state law by putting up signs advising their customers that Washington law prohibits removal of the liquor from the bases while continuing to permit sale of liquor that they *know* based on past history (and common sense) will leave the base, this can

---

[6] With the exception of the two Coast Guard facilities which have determined to continue purchasing from the Board.

only be seen as a clear lack of good faith in complying with what we understand is existing Department of Defense policy.

In view of the fact that, for example, the Sand Point facility located in the City of Seattle purchased from the Board during fiscal year 1986 a total of 17,003 cases of liquor, and we have been advised that the resident contingent of personnel at Sand Point is approximately 200 it is obvious that the vast majority of sales from this facility in the past have been for off-base consumption.[7] Any good faith attempt to prevent the promotion of violations of state law would, at a minimum, require scaling back of sales of the new "unauthorized" liquor at this facility to an amount appropriate for consumption by 200 persons plus liquor for on-premises consumption to qualified members in clubs located on the base. Similar considerations apply to NAF package stores on other bases in Washington, especially McChord AFB and Fort Lewis.

The business relationship between the State of Washington and the NAFs as presently structured has apparently been very satisfactory for all parties for over 33 years and has not encouraged or promoted the violation of Washington law. The recent decision of the NAF management to purchase from sources other than the Board has set the military bases up as bootleg suppliers and has put qualified

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[7] In fiscal 1986, the Sand Point NAF purchased 17,003 cases of liquor from the Board. Excluding consumption in on-base clubs and if none of this liquor left the base, each of the 200 personnel would have had to consume 85 cases (or about 1020 bottles) during fiscal 1986. This amounts to approximately 5 bottles per day per person (including Sundays and holidays).

purchasers in the position of having to violate Washington law should they remove the liquor from the base.

The intent of Congress in Public Law 99-500 was that liquor be acquired from "the most competitive source, price *and other factors* considered." Congress could not have intended to mandate that NAF purchases be made in a manner which inevitably requires, assists and promotes the wholesale flouting of state law to the financial detriment of the communities in which the purchasers live.

In view of the unique laws of the State of Washington, the anticipated problems with the state's enforcement of its laws against off-base military personnel, both active and retired, and (for the NAFs themselves) the loss of selection, increase of required inventory, and loss of good will and other benefits of dealing with the State of Washington, we would strongly suggest that these "other factors" should be considered and a reasonable negotiated settlement be arrived at whereby purchases of liquor for sale on Washington's military bases will continue to be made from the Washington State Liquor Control Board so that liquor may once again be legally removed from your bases as has been the case since 1954, or in the alternative that the Department of Defense establish a positive joint program with Washington State insuring that no liquor sold in NAF stores on military bases will be used for off-base consumption.

In the meantime we look forward to an expedited response from you concerning what good faith bona fide assistance you will be willing to render after March 1 to the State of Washington in preventing the bootlegging into our state of liquor intended for consumption on your military bases.

Very truly yours,

WASHINGTON STATE LIQUOR
CONTROL BOARD
/s/ L. H. Pedersen
L. H. Pedersen, Chairman
/s/ Kazuo Watanabe
Kazuo Watanabe, Member
/s/ Robert D. Hannah
Robert D. Hannah, Member

cc: Caspar Weinberger,
Secretary of Defense

APPENDIX 1

COMPARISON OF PROFITS MADE BY NAFs IN WASHINGTON WITH THOSE IN CALIFORNIA WITH DIRECT PURCHASE OF DISTILLED SPIRITS

Example: Average priced 750 ml 80 proof whiskey

1. Washington State Retail Price to Public $8.15
2. California Computed Retail Price to Public $6.05
   (With California's state liquor taxes and normal industry markup)
3. Washington Price *to* NAF $5.13
   (90% of delivered cost plus Board markup without state tax)
4. Direct Delivered Price to NAF from Distillery $3.87
   (No tax or wholesale markup)
5. NAF Sales Price to Qualified Washington Consumer $7.34
   (90% of Washington retail price)
6. NAF Sales Price to Qualified California Consumer $5.45
   (90% of California retail price)

GROSS PROFIT TO NAF UNDER DIFFERENT PURCHASING ALTERNATIVES:

	Washington (Board)	Washington (Direct)	California (Direct)
Sale Price:	$ 7.34	$ 7.34	$ 5.45
Cost:	5.13	3.87	3.87
NAF PROFIT:	$ 2.21	$ 3.47	$ 1.58

It can be seen that the present gross profits made by Washington NAFs with purchases made from the Board are approximately 40 percent *higher* than profits made by California NAFs through direct purchasing. If direct purchasing is instituted in Washington, the gross profit per bottle to the NAF will be more than double that made in California. A windfall of this kind, at the expense of state and local government and through a conscious program of promoting and encouraging violations of state law could not have been the intent of Congress.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

DECLARATION OF BERNARD MARCAK

Filed May 1, 1987

[Caption Omitted in Printing]

I, BERNARD MARCAK, hereby declare and state:

1. I am the Chief of the Nonappropriated Fund (NAF) Law Division, Office of the Staff Judge Advocate, Air Force Military Personnel Center, Randolph Air Force Base, Texas. Since January of 1986, I have also been serving as a special legal advisor and point-of-contact for the Department of Defense for alcoholic beverage matters.

2. On 1 July 1986, I received information indicating that Mr. Robert E. Hanson, Treasurer of the State of North Dakota, had reported that he had knowledge of a large number of cases involving abuses of the alcoholic beverage purchasing privilege by military Class VI (package beverage) store patrons. I telephoned Mr. Hanson on 2 July 1986 and asked him about his knowledge of any such cases. Mr. Hanson advised that he had only two examples to cite—one in North Dakota which he said occurred "about a year ago" and one in Hawaii which he admitted he knew virtually nothing about. His discussion of the North Dakota allegation pointed to an unsupported report by an undisclosed source that unnamed military Class VI store patrons had purchased unknown quantities of alcoholic beverages from the Class VI store at an unidentified military installation in the State and those beverages were subsequently diverted into the stocks of some commercial beverage outlet. He could not provide any

specifics and I was unable to find any military source which knew of any such diversion. I also contacted Mr. Eugene Carson, Liquor Control Administrator for the Liquor Commission in Honolulu, Hawaii, by telephone on 24 July 1986. This is the individual Mr. Hanson suggested I contact for details on the allegation of abuse in Hawaii. Mr. Carson advised that he had had some minor problems in the past, but that he was then receiving "outstanding cooperation" from the military in Hawaii and he felt that there were no problems of diversion or abuse at that time. I was also unable to find any military source which knew of any diversion problems in Hawaii.

3. Department of Defense policy is clear. The Armed Services Military Club and Package Store Regulations provide that "Packaged alcoholic beverage sales outlets are operated solely for the benefit of authorized purchasers. Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements." (See DoD 1015.3-R, Chapter 4, paragraph F3.) During my 2 July telephone conversation with Mr. Hanson, I offered my personal assistance in curbing any actual abuses he could find. I also told him that I was making the offer because the Department of Defense and the military services are serious about wanting to prevent such abuses and are always prepared to take necessary action to stop them if and when they do occur. In response to a direct question I posed, Mr. Hanson advised that the alleged North Dakota and Hawaii abuses were the only ones he knew about at that time. Despite my offer of assistance to Mr. Hanson, I have not received any

further allegations of abuse of the alcoholic beverage purchasing privilege from him or anyone else representing North Dakota.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of April, 1987.

/s/ Bernard Marcak
BERNARD MARCAK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

AFFIDAVIT OF
ROBERT E. HANSON

Filed May 18, 1987

[Caption Omitted in Printing]

I, Robert E. Hanson, being first duly sworn, depose and say:

I.

I am the State Treasurer of the state of North Dakota. The State Treasurer is a constitutionally elected officer of the state under N.D. Const. Art. V, § 12. The powers and duties of the State Treasurer are prescribed by law.

II.

I have reviewed the April 29, 1987, Declaration of Bernard Marcak that was subsequently filed with this court.

III.

Paragraph 3 of Mr. Marcak's Declaration is ambiguous and does not adequately represent the relevant facts as they relate to this case. Specifically, I refer to the last sentence of paragraph 3 which states as follows:

> 3. Department of Defense policy is clear. The Armed Services Military Club and Package Store Regulations provide that "Packaged alcoholic beverage sales outlets are operated solely for the benefit of authorized purchasers. Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise di-

vert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements." (See DoD 1015.3-R, Chapter 4, paragraph F3.) During my 2 July telephone conversation with Mr. Hanson, I offered my personal assistance in curbing any actual abuses he could find. I also told him that I was making the offer because the Department of Defense and the military services are serious about wanting to prevent such abuses and are always prepared to take necessary action to stop them if and when they do occur. In response to a direct question I posed, Mr. Hanson advised that the alleged North Dakota and Hawaii abuses were the only one he knew about at that time. *Despite my offer of assistance to Mr. Hanson, I have not received any further allegations of abuse of the alcoholic beverage purchasing privilege from him or anyone else representing North Dakota.*
(Emphasis supplied.)

IV.

I maintain a listing of my out-of-state telephone calls. This file indicates that subsequent to the July 2, 1986, telephone conversation referred to in paragraph 3 of Mr. Marcak's declaration, I have had at least three telephone discussions with Mr. Marcak and/or his staff concerning allegations of abuses of the alcohol distribution system by military personnel in North Dakota:

a. On August 12, 1986, I telephoned Mr. Marcak regarding the alleged dismissal of a person from the Minot Air Force Base for allegedly illegally removing items, including liquor, from the base. At that time, I expressed concern that liquor was being diverted from the base into

the state's domestic commerce and offered to assist the military in resolving this problem. This particular incident was further discussed with Mr. Ray Leonard, an assistant to Mr. Marcak, on August 15, 1986. During these discussions, I offered to provide the Minot Air Force Base with a copy of a computerized listing of all military purchases of alcohol from out-of-state suppliers, which my office had compiled for our internal use. This computerized listing would have assisted the military in its investigation of the alleged improprieties.

b. On October 22, 1986, Mr. Marcak and I had a telephone conference in which we discussed the diversion of liquor by military personnel at the Minot Air Force Base after local wholesalers had delivered the liquor to the base. Wholesalers had complained to me that they were delivering more liquor, as evidenced by signed delivery receipts, than was being inventoried and paid for by the military. The wholesalers informed me that the base responded to their objection by claiming that any loss of product from the time it was delivered and the time it was inventoried should be borne by the wholesaler. In our telephone conversation of October 22, 1986, Mr. Marcak agreed that this practice should not be occurring and indicated he would attempt to correct the problem. When signed documentation was resubmitted, the military admitted that the shortage was its problem and paid for the disputed merchandise.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of May, 1987.

/s/ Robert E. Hanson
Robert E. Hanson

(SEAL)

Subscribed and sworn to before me
this 15th day of May, 1987.

/s/ Janet R. Franklund
NOTARY PUBLIC
Com. Exp. 2-05-93

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-5334ND

United States of America,	)	Appeal from the
	)	United States
Appellant,	)	District Court
	)	for the District of
vs.	)	North Dakota
	)	
State of North Dakota,	)	(Filed April
Robert E. Hanson, State	)	3, 1989)
Treasurer of North Dakota,	)	
	)	
Appellees.	)	

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court is reversed in accordance with the opinion of this Court.

September 9, 1988

Let the within Mandate be entered on the Clerk's Records.
April 3, 1989

/s/ Pat A. Conmy
Patrick A. Conmy, Chief Judge
A true copy.

ATTEST:

/s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: MARCH 30, 1989

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 3rd day of April 1989.

EDWARD J. KLECKER, CLERK

By: /s/Deborah Thomason
Deputy

APPELLANT'S

BRIEF

(5)

No. 88-926

In The

Supreme Court of the United States

October Term, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE APPELLANTS

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30 pp

QUESTION PRESENTED

Whether the twenty-first amendment gives North Dakota the power to require labeling of and reports concerning liquor destined for federal enclaves located in North Dakota.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 88-926

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v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (J.S. App. at A-1 to A-22) is reported at 856 F.2d 1107. The opinion of the district court (J.S. App. at A-23 to A-32) is reported at 675 F. Supp. 555.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on September 9, 1988. J.A. 53. Defendants-appellants filed their notice of appeal

to this Court on November 16, 1988. J.S. App. at A-35. This Court noted probable jurisdiction on March 27, 1989. The jurisdiction of the Court is being invoked pursuant to 28 U.S.C. § 1254(2) (1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Const. amend. XXI, § 2:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

10 U.S.C. § 2488 (Supp. V 1987):

§ 2488. Nonappropriated fund instrumentalities: purchase of alcoholic beverages

> (a) The Secretary of Defense shall provide that—
>
> (1) covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered, except that
>
> (2) in the case of malt beverages and wine, such purchases shall be made from, and delivery shall be accepted from, a source within the State in which the military installation concerned is located.
>
> (b) If a military installation located in the contiguous States is located in more than one State, a source of supply in any State in which the installation is located shall be considered for the purposes of subsection (a)(2) to be a source within the State in which the installation is located.

> (c) In this section:
>
> (1) The term "covered alcoholic beverage purchases" means purchases of alcoholic beverages by a nonappropriated fund instrumentality of the Department of Defense with nonappropriated funds.
>
> (2) The term "State" includes the District of Columbia.

50 U.S.C. app. § 473 (1982 & Supp. IV 1986):

§ 473. Regulations governing liquor sales; penalties

> Subject to section 2683(c) of title 10 United States Code, the Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquor to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

32 C.F.R. § 261.4 (1988):

> Procedures and guidance are prescribed in DoD 1015.3-R, "Armed Services Military Club and Package Store Regulations." Chapter 4, section C., of this guidance reads as follows:
>
> "C. *COOPERATION.* The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at

> any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state."

N.D. Admin. Code § 84-02-01-05(1):

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

N.D. Admin. Code § 84-02-01-05(7):

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such a bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the state treasurer.

———o———

STATEMENT OF THE CASE

The United States operates two military installations in North Dakota, neither of which is an exclusive federal jurisdiction enclave. J.A. 16; J.S. App. at A-23. The clubs

and package stores located on the military installations are nonappropriated fund instrumentalities (NFIs) of the federal government and, as such, are not supported by direct government funding. J.A. 13; J.S. App. at A-23.

The clubs and package stores on the military installations purchase alcoholic beverages for resale to active and retired military personnel, their spouses and dependents, as well as other individuals authorized by the Department of Defense. J.S. App. at A-23; *see also* "Armed Services Military Club and Package Store Regulations," DoD 1015.3-R, ch. 2(B) (May 1982). These clubs and stores make liquor sales to eligible purchasers whether they live on or off base. Clubs and package stores are established as part of the Morale, Welfare, and Recreation Program of the Department of Defense. Any profits resulting from the operations are expected to be used to support military recreational activities. J.S. App. at A-30 to A-31.

Before December 19, 1985, there was no federal statute governing the purchase of alcoholic beverages by military enclaves. For the period from December 19, 1985, to October 29, 1986, federal law required the United States military to purchase distilled spirits from in-state suppliers. Act of December 19, 1985, Pub. L. No. 99-190, § 8099, 99 Stat. 1185, 1219. Effective October 30, 1986, Congress required the military to purchase distilled spirits from the the "most competitive source." Act of October 30, 1986, Pub. L. No. 99-591, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 3341, 3341-116; 10 U.S.C. § 2488(a)(1) (Supp. V 1987). The Defense Department is still required to purchase beer and wine from a source within the state in which the military installation is located. 10 U.S.C. § 2488 (a)(2) (Supp. V 1987).

North Dakota law prohibits liquor from entering the State's commerce other than through the State's established liquor distribution system. *See* N.D.C.C. §§ 5-02-01, 5-03-01; N.D. Admin. Code § 84-02-01-05(2). Other than liquor shipments destined for federal enclaves, "all liquor arriving in North Dakota shall be shipped only to licensed wholesalers." N.D. Admin. Code § 84-02-01-05(2). Licensed wholesalers, in turn, may sell only to licensed retailers, other licensed wholesalers, and federal enclaves. N.D.C.C. § 5-03-01. North Dakota imposes taxes at both the wholesale and retail levels of sale. N.D.C.C. § 5-03-07; N.D.C.C. ch. 57-39.2. The State's interests in establishing and maintaining its liquor distribution system include temperance, orderly marketing conditions, and the efficient collection of taxes. J.A. 36.

In the past there have been instances of diversion of alcoholic beverages from the North Dakota federal enclaves into the State's domestic commerce in contravention of the State's established liquor distribution system. J.A. 35, 50-51. Unlawful diversion of military liquor and related abuses has also occurred in other states. J.A. 35-45. For instance, a dependent of a Defense Department employee diverted alcoholic beverages off a federal enclave in Hawaii in quantities large enough to supply the dependent's own liquor store in the private sector. J.A. 36. The diversion of liquor off military bases is also reflected by the mass quantities of alcoholic beverages sold on base. The Washington State Liquor Control Board in fiscal year 1986 sold 17,003 cases of liquor to a military enclave that had on on-base personnel population of 200. J.A. 42. Assuming no diversion, each of the 200 personnel

would have had to consume 85 cases (or about 1,020 bottles) of liquor during fiscal year 1986 (excluding consumption in on-base clubs). J.A. 36, 42.

The State imposed the regulations challenged here in order to prevent the unlawful diversion of liquor, either en route to the federal enclaves or off the enclaves after delivery, into the State's domestic commerce. J.A. 34. N.D. Admin. Code § 84-02-01-05(7) requires prime source suppliers to affix a label to each bottle of liquor destined for federal enclaves located in North Dakota. That label states that the liquor is exclusively for consumption within the federal military enclave. The labels are not tax stamps and do not produce revenue for the State. J.A. 34; J.S. App. at A-25. In addition, each supplier must file a monthly report showing the quantity of liquor shipped into the State during the preceding month. N.D. Admin. Code §84-02-01-05(1).

In response to the State's regulations, one prime source supplier informed the military that it would increase its prices from $.85 to $20.50 per case because of the additional costs of affixing a label to each bottle of liquor.[1] J.A. 15; J.S. App. at A-25. Five other suppliers indicated that they preferred to fill orders to North Dakota military enclaves through their established wholesale outlets in North Dakota rather than comply with the State's regula-

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[1]The estimated cost of the labels is approximately $.03 to $.05 per label, depending on the supplier and quantity ordered. J.A. 34-35. There is no explanation given by the supplier for the cost increase that is not attributable to the expense of the labels. J.A. 18-19. Presumably, the additional cost would be attributable to the cost of affixing the labels.

tions. J.A. 34; J.S. App. at A-25. Other suppliers have indicated a willingness to comply with the State's regulations. J.A. 34.

In its Complaint in this suit the United States sought declaratory relief and an injunction against the enforcement of North Dakota's liquor regulations (N.D. Admin. Code §§ 84-02-01-05(1), 84-02-01-05(7)) as applied to prime source suppliers of liquor to federal enclaves located in North Dakota. J.A. 3-8. The United States asserted that North Dakota's regulations interfere with the purchase of liquor by the Department of Defense and conflict with federal regulation in violation of the supremacy clause of the United States Constitution. J.A. 7.

The regulation to which the United States referred in its Complaint, 32 C.F.R. § 261.4 (1988), provides that the military shall procure alcoholic beverages so as to obtain "the most advantageous contract, price and other considered factors."[2] The United States further alleged that if the military purchased its liquor from local North Dakota wholesalers, rather than prime source suppliers, its costs would rise approximately $200,000 to $250,000 annually. J.A. 7, 23-24, 27.

The State of North Dakota responded in its Answer that the liquor regulations do not conflict with federal policy or violate the supremacy clause of the United States Constitution. J.A. 11. The State contended that the liquor regulations are lawful regulations authorized by the twen-

[2]10 U.S.C. § 2488(a)(1) (Supp. V 1987) also requires the military to purchase alcoholic beverages "from the most competitive source, price and other factors considered."

ty-first amendment of the United States Constitution and are necessary to prevent the unlawful diversion of alcohol into the State's domestic commerce. J.A. 11.

The parties presented the case to the district court on cross motions for summary judgment supported by uncontested affidavits and a stipulation of facts. In granting summary judgment in favor of the State, the district court found that there is no conflict between the State regulations and federal law. The district judge reasoned that "[t]he state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase, but they do not prevent the federal government from obtaining those beverages at the 'lowest cost' [as the] 'lowest cost' has merely increased." J.S. App. at A-28 (footnote omitted). The court went on to hold that, even if a conflict were found to exist between the State and federal laws, the State's interests underlying its regulations outweighed the corresponding federal interests and, therefore, "enforcement of the state law is not barred by the Supremacy Clause." J.S. App. at A-31.

The United States appealed to the United States Court of Appeals for the Eighth Circuit. The case was heard by a three-judge panel, which reached a split decision. The majority concluded that the twenty-first amendment does not empower the State to regulate the shipment of alcohol through its territory destined for federal enclaves. J.S. App. at A-12 to A-13. The majority also stated that "[e]ven assuming that the twenty-first amendment extends jurisdiction over the subject matter . . . we find that the balancing of state and federal interests would lead us to conclude that the State's regulations are pre-empted

by federal law." J.S. App. at A-13. In his dissenting opinion, Chief Judge Lay concluded that "the state is within its power under the twenty-first amendment to enact this regulation." J.S. App. at A-22.

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SUMMARY OF ARGUMENT

North Dakota's regulations challenged here require that prime source suppliers affix a label to each bottle of liquor destined for federal enclaves in North Dakota and file monthly reports showing the quantity of liquor shipped into the State. The purpose underlying the regulations is to monitor the flow of intoxicants to the military enclaves located in North Dakota and prevent the unlawful diversion of the liquor, either en route to the enclaves or off the enclaves after delivery, into the State's commerce.

As interpreted by this Court, the twenty-first amendment promises that each state shall decide what is best in establishing a liquor distribution system and regulating the unlawful diversion of intoxicating liquors within its borders. The North Dakota liquor regulations challenged here, aimed at preventing the unlawful diversion of liquor into the State's commerce in contravention of its established liquor distribution system, are an exercise of the State's core power under the twenty-first amendment. The State's exercise of its exclusive constitutional authority cannot be overridden by mere federal legislation and the normal operation of the supremacy clause. Accordingly, North Dakota's regulations should prevail regardless of whether they incidentally affect the federal government's liquor procurement efforts.

Even if North Dakota's regulations are not valid solely because they are an exercise of the State's core power reserved by the twenty-first amendment, the regulations should be upheld because they do not unconstitutionally interfere with the federal government's liquor procurement efforts.

The federal statute involved here requires that the military procure its liquor from the "most competitive source, price and other factors considered." Similarly, the federal regulation in question provides that the military shall procure alcoholic beverages so as to obtain "the most advantageous contract, price and other considered factors." The federal law relevant to this case does not reveal any intent to pre-empt any state regulation aimed at preventing the unlawful diversion of liquor purchased by the military. Nor do the regulations impermissibly conflict with federal policy merely because the military's liquor suppliers must comply with certain requirements that might increase their cost of production. Even assuming a conflict between North Dakota's regulations and federal policy, the State's interests underlying its liquor regulations outweigh the federal government's economic interest.

North Dakota's regulations are not pre-empted by federal law and are a valid exercise of the State's power under the twenty-first amendment.

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ARGUMENT

NORTH DAKOTA'S INTEREST IN PREVENTING THE UNLAWFUL DIVERSION OF LIQUOR INTO ITS COMMERCE IS PROTECTED BY THE TWENTY-FIRST AMENDMENT.

The twenty-first amendment explicitly reserves power to the states and necessarily restricts the power of Congress. Accordingly, if a state's liquor regulation is "so closely relate[d] to the powers reserved by the twenty-first amendment . . . the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). If a challenged state regulation does not implicate interests at the core of the twenty-first amendment, this Court has applied a traditional pre-emption analysis to determine the constitutionality of the state regulation in a "pragmatic effort to harmonize state and federal powers." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980).

I. NORTH DAKOTA'S REGULATIONS ARE AN EXERCISE OF ITS CORE POWER RESERVED BY THE TWENTY-FIRST AMENDMENT.

On numerous occasions, this Court has held that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *See, e.g., Midcal Aluminum*, 445 U.S. at 110. This Court has also recognized that the states have broad regulatory power to prevent the unlawful diversion of liquor en route to federal enclaves located within their borders and off the enclaves after delivery.

In *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 377 (1973), this Court determined that "a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control . . . shipments [of liquor destined for federal enclaves] during their passage through its territory insofar as necessary to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State.'" *See also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1964). The Court in *State Tax Commission of Mississippi* further recognized that "the State, of course, remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the two bases of liquor that has been purchased and is in fact 'destined for use, distribution, or consumption' within its borders." *State Tax Commission of Mississippi*, 412 U.S. at 378.

North Dakota promulgated the regulations challenged here in order to prevent the unlawful diversion of liquor, either en route to the military enclaves or off the enclaves after delivery, into the State's domestic commerce in contravention of its liquor distribution system. These regulations are an important aspect of the State's established liquor distribution system, which requires that all liquor entering North Dakota, other than that destined for federal enclaves, be shipped "only to licensed wholesalers." N.D. Admin. Code § 84-02-01-05(2). By requiring prime source suppliers who ship liquor intoxicants directly to federal enclaves in North Dakota to affix a label on the liquor containers and to file information reports regarding such transactions with the State Treasurer, North Dakota has implemented an unintrusive regulatory scheme

that will enable it to monitor shipments of liquor passing through its territory en route to federal enclaves and to identify unlawfully diverted intoxicants.

North Dakota's regulations, as part of the State's liquor distribution system, are an exercise of the State's core power under the twenty-first amendment. This Court has expressly determined that the states are empowered to prevent unlawful diversion of liquor en route to federal enclaves or off the enclaves after delivery. *State Tax Commission of Mississippi*, 412 U.S. at 377-78. Accordingly, the State's regulations should prevail as a proper exercise of its twenty-first amendment powers regardless of whether they conflict with federal policy.

II. NORTH DAKOTA'S REGULATIONS EXERCISING ITS TWENTY-FIRST AMENDMENT POWERS ARE NOT PRE-EMPTED BY THE FEDERAL STATUTE AND REGULATIONS IN QUESTION.

A. The Federal Statute, its Legislative History, and the Federal Regulations Demonstrate that there is Neither any Intent to Pre-empt the State's Law nor a Conflict Between the North Dakota Regulations and Federal Law.

The United States argues that the supremacy clause prevents the State from imposing any regulation on suppliers of liquor to the military that might incidentally increase the cost of the liquor.[3] Although the State contends

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[3]The Court's traditional pre-emption analysis is well established:

> In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for find-

(Continued on following page)

that the regulations challenged here are valid solely because they are an exercise of the State's core power reserved by the twenty-first amendment, the regulations are permissible even under a traditional pre-emption analysis.

In the federal pre-emption field, this Court has cautioned that "we start with the assumption that the historic police powers of the States are not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This Court has stated that unless Congress' pre-emptive intent is abundantly clear, the Court should hesitate to invalidate state regulation for the added reason that "the state is powerless to remove the ill effects of [the Court's] decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1943).

A review of the federal law in the present case fails to reveal an intent, either express or implied, to pre-empt

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> ing pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent that it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

California v. ARC America Corp., 109 S. Ct. 1661, 57 U.S.L.W. 4425, 4427 (April 18, 1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (citations omitted).

state liquor regulations aimed at preventing unlawful diversion of liquor purchased by the military.

The federal statute requires that alcohol procurement "shall be made from the most competitive source, price and other factors considered." 10 U.S.C. § 2488(a)(1) (Supp. V 1987). Like the federal statute, the Defense Department's regulations require that the purchase of alcoholic beverages "shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other coinsidered factors." 32 C.F.R. § 261.4 (1988).[4]

The language of both the statute and the regulation demonstrate that there is no intent that the military purchase liquor at some absolute low price in disregard of local regulations imposed on suppliers. Further, there is no legislative history that reveals an intent on the part of Congress to pre-empt state laws aimed at preventing unlawful diversion.

The language of both the statute and regulation require only the most "competitive" or "advantageous" contract price available. The State's regulations do not prevent the military from procuring liquor at this relatively low price. Instead, as the district court found, "[t]he state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase,

[4]Federal regulations have the same pre-emptive effect as federal statutes "unless it appears from the statute or its legislative history that the [regulation] is not one that Congress would have sanctioned." *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

but they do not prevent the federal government from obtaining those beverages at the 'lowest cost' [as the] 'lowest cost' has merely increased." J.S. App. at A-28. Accordingly, the federal law and State regulation do not conflict as a matter of statutory construction, and this is not a situation "when compliance with both state and federal law is impossible," *California v. ARC America Corp.*, 109 S. Ct. 1661, 57 U.S.L.W. 4425, 4427 (April 18, 1989).

The United States contends that even in the absence of a clear congressional intent to pre-empt and even though compliance with both state and federal law is possible, North Dakota's regulations unconstitutionally interfere with federal law because they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The State's regulations, however, neither present an obstacle to the federal objective that liquor procurement be from the "most competitive source" (or "most advantageous contract") nor interfere with the military's ability to negotiate with any liquor supplier it desires. At most, the labeling requirement may cause some limited inconvenience or additional costs to prime source suppliers. Other than the possible increased costs, which can be absorbed by the suppliers or passed on to the individual purchasers of the liquor, the regulations impose no burdens on the federal government.

There is no practical distinction between the potential incidental cost effects of North Dakota's labeling requirements and the indirect effect on costs caused by other

state regulations applied to suppliers of the military. A state's labor laws, employee benefits laws, health and safety requirements, license fees, and taxes all increase the cost of goods (including liquor) sold to the military and, therefore, would be called into question if the United States' position in this case is accepted.

This Court, however, has rejected the contention that state regulation of suppliers is impermissible merely because that regulation may indirectly cause an economic burden on a federal activity. *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943).[5] In *Penn Dairies* this Court held that "in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable," Pennsylvania's minimum wholesale milk prices requirement did not conflict with federal legislation requiring the military to purchase its supplies from "the lowest responsible bidder." *Id.* at 275. In the present case, there is no "evidence

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[5]Only where a state has attempted to regulate a governmental function directly, as opposed to reasonable regulation of government suppliers, has the supremacy clause been interpreted as pre-empting the state's efforts. *See United States v. Tax Commission of Mississippi*, 421 U.S. 599 (1975); *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Paul v. United States*, 371 U.S. 245 (1963); *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956); *Mayo v. United States*, 319 U.S. 441 (1943); *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943); *Johnson v. Maryland*, 254 U.S. 51 (1920).

As discussed above, the State regulations in question do not directly regulate the government or a governmental function. They regulate suppliers.

of an inflexible Congressional policy" indicating that the Department of Defense is immune from the incidental effects of the State's law aimed at preventing unlawful diversion.

The federal regulation contains a provision which is not included in 10 U.S.C. § 2488 (Supp. V 1987) and which could be construed to broaden the pre-emptive effect of the Defense Department's procurement policy set forth in 32 C.F.R. § 261.4 (1988).

Unlike Congress, the Department of Defense has provided that consideration of "other factors" permitted in its liquor procurement policy "shall not be construed as meaning any submission to state control." 32 C.F.R. § 261.4 (1988). The North Dakota regulations, though, do not constitute "state control" of the military's liquor procurement policy. In this case the State is not attempting to regulate the governmental functions of the Department of Defense. Rather, the State's regulations are imposed on the suppliers of liquor to the military in a manner consistent with North Dakota's established liquor distribution system.

Even assuming *arguendo* that North Dakota's regulations conflict with this provision of 32 C.F.R. § 261.4 (1988), the Secretary of Defense's regulations do not implement an express congressional objective. As discussed above, Congress has not indicated an intent to pre-empt state law aimed at preventing unlawful diversion.

The supremacy clause and the twenty-first amendment should not be interpreted as affording the Secretary of Defense the authority to pre-empt reasonable state liquor regulation, especially in the absence of clear con-

gressional direction. To give pre-emptive effect to the federal regulations involved here would eradicate any real meaning to the twenty-first amendment and its status in our Constitution.

The United States "must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the states." *California v. ARC America Corp.*, 109 S. Ct. 1661, 57 U.S.L.W. 4425, 4427 (April 18, 1989). The presumption against finding pre-emption of state law is especially strong when the state's regulations are an exercise of the power reserved by the twenty-first amendment. North Dakota's regulations do not impose a sufficient obstacle to the federal government's economic interests in this case to overcome the presumption against finding pre-emption of the State's regulations.

B. North Dakota's Interests Underlying its Regulations Aimed at Preventing Unlawful Diversion Outweigh the Federal Government's Economic Interests.

In cases where challenged state regulations do not implicate interests at the core of the twenty-first amendment and do conflict with federal policy, this Court has proceeded to balance the competing federal and state interests to determine whether the state regulation must yield to federal policy.[6] The Court has struck down state

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[6]*See Crisp*, 467 U.S. at 714-16 (Oklahoma's interests underlying its restrictions on liquor advertising balanced against the federal objective insuring widespread availability of diverse cable services throughout the country); *Midcal Aluminum*, 445 U.S. at 110, 113-14 (state's interest in promoting temperance through its wine pricing program balanced against federal objectives of the Sherman Act).

liquor regulations conflicting with federal policy only after the Court identified a long-standing federal interest as clearly outweighing the state's interests.[7]

The State's significant interest underlying the regulations challenged here is predicated on the fact that liquor is diverted off the military bases into the State's commerce. The NFIs sell packaged liquor to authorized purchasers who reside off base. This practice alone guarantees that liquor will be diverted into the State's territory for the purchasers' consumption, the consumption of their friends and relatives, or resale to North Dakota residents.

The liquor the military purchases directly from prime source suppliers is not subject to State taxation and escapes the wholesale profit factor. The resulting lower prices of liquor sold at the NFIs, as compared to liquor sold by North Dakota retailers, encourages diversion of liquor from the enclaves into the State's commerce.

The State does not regulate the governmental functions associated with the sale of intoxicants on the federal enclaves located within North Dakota. The Department of Defense determines the class of eligible purchasers, the type of liquor it sells, the minimum age of its buyers,[8] the

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[7]*See 324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Crisp*, 467 U.S. 691; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Midcal Aluminum*, 445 U.S. 97.

[8]10 U.S.C. 2683(c) (1982 & Supp. IV 1986) requires that "the Secretary concerned shall establish and enforce as the minimum drinking age on a military installation located in a State the age established by the law of that State as the State minimum drinking age" unless the installation is located within 50 miles of another state or Mexico or Canada which has a lower

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days it will permit the sale of liquor, and the times that its clubs and package stores will be open. *See* 50 U.S.C. app. § 473 (1982 & Supp. IV 1986). For example, the Secretary of Defense could determine that NFIs on the North Dakota enclaves should be open on days that the State's retail liquor establishments are closed by law. *See* N.D.C.C. § 5-02-05. Or the Secretary of Defense might decide to expand the class of eligible purchasers of liquor from NFIs for the purpose of enhancing the revenue for the morale, welfare, and recreation of the armed forces. Either action would exacerbate the problem of authorized personnel purchasing alcohol on base for off-base consumption and distribution.

The State has a strong interest in imposing its regulations aimed at preventing unlawful diversion as long as it is powerless to regulate directly the governmental functions of the NFIs. The Department of Defense has likewise stated its interest in preventing the unlawful diversion of alcoholic beverages and, therefore, the United States cannot dispute the legitimacy of the State's interest.[9]

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drinking age. The Minot Air Force Base is located within 50 miles of Canada. After the intiation of this litigation, the minimum age at the Minot Air Force Base was reduced from 21 to 18 for the purchase of beer, wine, and wine coolers.

[9] "Armed Services Military Club and Package Store Regulations," DoD 1015.3-R, ch. 4(F)(3). (May 1982), states as follows:

> *Diversion.* Packaged alcoholic beverage sales outlets are operated solely for the benefit of authorized purchasers. Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages to unauthorized personnel, or for purposes which violate federal, state, or local laws, or Status of Forces agreements.

North Dakota's liquor distribution system and its other alcoholic beverage control laws promote several weighty interests including temperance, orderly marketing conditions, and efficient tax collection. The diversion of contraband liquor into the State undermines its liquor distribution system and alcoholic beverage control laws, matters of peculiarly local concern as reflected by the status of the twenty-first amendment in our Constitution. It is against these significant State interests that the relevant federal interests must be balanced.

The United States' primary interest underlying its liquor procurement policy, as asserted in the proceedings below, is the procurement of liquor at the lowest price in furtherance of the Department of Defense's Morale, Welfare, and Recreation Program for the armed forces and their families. 32 C.F.R. § 261.3 (1988). It is not clear, however, that the costs of complying with North Dakota's regulations will in fact affect the NFIs' profits. As determined by the district court, "it is much more likely that the increased costs will be passed on to the military consumer." J.S. App. at A-31. Or the suppliers could absorb the cost and not even pass it on to the NFIs.

There is no suggestion that the United States is unable to obtain the desired liquor from another source if a particular prime source supplier refuses to deal directly with the federal enclaves because of the State's labeling requirement. Therefore, other than the possible increased cost, which can be absorbed by the suppliers or passed on to the individual purchasers, the regulations do not impose any burden on the federal government.

As the foregoing discussion demonstrates, the State's significant interests underlying its liquor regulations are easily identified and outweigh the United States' economic interests, which are affected only incidentally or not at all by the State regulations. As such, a balancing analysis weighs in favor of the State.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Dated this 23rd day of May, 1989.

Respectfully submitted,

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APPELLEE'S

BRIEF

No. 88-926

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether regulations of the State of North Dakota, requiring out-of-state liquor suppliers to affix to each bottle of liquor sold to federal enclaves located in North Dakota a label stating that the liquor must be consumed on those premises and requiring those suppliers to file monthly reports, impermissibly interfere with the federal procurement scheme and otherwise fall outside the State's authority under the Twenty-first Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases – Continued: Page

Constitution, statutes and regulations: Page

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A1-A22) is reported at 856 F.2d 1107. The opinion of the district court (J.S. App. A23-A32) is reported at 675 F. Supp. 555.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. The notice of appeal was filed on November 16, 1988 (J.S. App. A35), and the jurisdictional statement was docketed on December 5, 1988. The Court noted probable jurisdiction on March 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).[1]

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[1] The Court's appellate jurisdiction conferred in Section 1254(2) was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, § 2(a), 102 Stat. 662, but the repeal did not take effect until September 25,

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. Article I, Section 8 of the United States Constitution provides in pertinent part: "The Congress shall have Power * * * To raise and support Armies * * * [and] To make Rules for the * * * Regulation of the land and naval Forces * * *."

Article I, Section 8 of the United States Constitution further provides in pertinent part: "The Congress shall have Power * * * To exercise * * * Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *."

Article IV, Section 3 of the United States Constitution provides in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *."

Article VI, Section 2 of the United States Constitution provides in pertinent part: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *."

Section 2 of the Twenty-first Amendment to the United States Constitution provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

1988 (§ 7, 102 Stat. 664). The repeal does not apply to this case, because it does "not * * * affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

2. Title 10, United States Code, Section 2488 (Supp. V 1987), provides in pertinent part:

> (a) The Secretary of Defense shall provide that –
>
> (1) covered alcoholic beverage purchases made for resale on a military installation located in the United States shall be made from the most competitive source, price and other factors considered, except that
>
> (2) in the case of malt beverages and wine, such purchases shall be made from, and delivery shall be accepted from, a source within the State in which the military installation concerned is located.

Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4),[2] provides in pertinent part:

> The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or

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[2] In 1983, the Department of Defense amended the regulation by substituting the phrase "price and other factors considered" for the phrase "price and other considered factors." Department of Defense Change No. 1 for Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C. The Code of Federal Regulations inaccurately contains the original phrasing. We have inserted the corrected phrasing in our citation to the codified version of the regulation in the Code of Federal Regulations and will refer to that corrected version.

represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

3. Section 84-02-01-05(7), N.D. Admin. Code (1986), provides:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed by the state treasurer.

Section 84-02-01-05(1), N.D. Admin. Code (1986), provides:

> All persons sending or bringing liquor into North Dakota shall file a North Dakota Schedule A Report of all shipments and returns for each calendar month with the state treasurer. The report must be postmarked on or before the fifteenth day of the following month.

STATEMENT

1. The State of North Dakota contains two federal enclaves, Grand Forks Air Force Base and Minot Air Force Base, over which the State and the federal government exercise concurrent jurisdiction. Each military installation contains clubs and package goods stores that sell alcoholic beverages exclusively to military personnel and their families. These clubs and stores are "non-appropriated

fund instrumentalities" (NFIs) of the federal government. Although operated by the military, they do not receive congressionally appropriated funds. Instead, the facilities support themselves; any profits generated from liquor sales are used to finance recreational and other support services for each base's military personnel and their families. J.S. App. A3, A23.

Under 10 U.S.C. 2488(a)(1) (Supp. V 1987), the military must obtain liquor (exclusive of beer and wine) for the NFIs from "the most competitive source, price and other factors considered * * *."[3] In order to minimize cost, the military operates a "joint-military service consolidated purchasing program for distilled spirits" (J.A. 25). Under this program, at the time pertinent here, all military facilities in a thirteen-state area, including the two North Dakota installations, purchase alcoholic beverages in bulk directly from distillers/suppliers, as opposed to purchasing from local wholesalers. This program enables the military to negotiate the best possible price, since it can avoid buying from distributors at local wholesale prices (which include additional markups).[4] Prices for liquor

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[3] Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C, also requires the military to obtain liquor for the NFIs "under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered" (32 C.F.R. 261.4). The Secretary of Defense promulgated the Department of Defense Armed Services Military Club and Package Store Regulations under his rulemaking authority conferred by 50 U.S.C. App. 473, which empowers him "to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces."

[4] In response to prodding by Congress, the military recently has further consolidated its purchasing program for alcoholic beverages sold by NFIs located on Army and Air Force bases. See H.R. Rep. No. 563, 100th Cong., 2d Sess. 200-201 (1988); H.R. Conf. Rep. No. 753,

purchased by the military from out-of-state suppliers are significantly lower than those for liquor bought from licensed wholesalers within North Dakota.[5] See J.A. 5, 25.

2. Effective January 1, 1986, the State of North Dakota issued specific regulations aimed at the federal government's purchase of liquor for the two military bases located in the State.[6] The principal regulation, the labeling provision, requires all out-of-state liquor suppliers to affix to each bottle of liquor sold to those federal installations

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100th Cong., 2d Sess. 375-376 (1988). Effective March 25, 1989, the Army and Air Force Exchange Service (AAFES) became solely responsible for operating those NFIs. See Transfer of Function Agreement Between the Departments of the Army and Air Force and the Army and Air Force Exchange Service for the Management and Operation of Army and Air Force Class VI (Package Beverage) Stores (Nov. 1, 1988). AAFES, whose primary purpose is to provide discount goods and services to military personnel, is an established entity within the Army and the Air Force. See Department of the Army Regulation 60-10/Department of the Air Force Regulation 147-7, ch. 1 (1984). As a result of this transfer of authority, AAFES currently coordinates alcoholic beverage purchases for NFIs on military bases located throughout the country; AAFES purchases in bulk quantities whenever appropriate and utilizes a central distribution system. With respect to purchases of alcoholic beverages for the North Dakota installations, AAFES continues to buy most of those spirits directly from out-of-state distillers/suppliers.

[5] Under the State's regulatory scheme, there are three levels of liquor suppliers: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. The State imposes a tax at the wholesale and retail levels. See N.D. Cent. Code §§ 5-03-04 and 5-03-07 (1975); N.D. Cent. Code § 57-39.2-03.2 (1983 & Supp. 1987).

[6] Appellant Robert E. Hanson, as the State Treasurer of North Dakota, promulgated the regulations under his statutory authority to regulate the State's liquor distribution system. See N.D. Cent. Code § 5-03-05 (1975). The regulations "have the force of law thirty days after the date of mailing to the persons affected by such regulations" (*ibid.*).

a label stating that the liquor must be consumed on those premises. N.D. Admin. Code § 84-02-01-05(7) (1986). The regulation imposes no such labeling requirement on local suppliers and distributors. A companion provision calls for all suppliers to file a monthly report showing the quantity of liquor shipped into the State during the preceding month. N.D. Admin. Code § 84-02-01-05(1) (1986).

In early November 1986, the State held a meeting for representatives of out-of-state distillers/suppliers to explain the labeling and reporting requirements for direct sales of liquor to the two bases.[7] As a result of the added administrative burdens and costs imposed by compliance with those new requirements, five out-of-state suppliers, Heublein, Inc., James B. Beam, Joseph Seagrams, Somerset Importers, and Hiram Walker & Sons, Inc., informed the military that they would no longer ship liquor to the bases in North Dakota.[8] Another out-of-state distiller, Kobrand Importers, Inc., agreed to continue supplying liquor to the NFIs in North Dakota, but told the

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[7] From December 1985 through October 1986, federal law required the military to procure liquor from suppliers within the State in which the base was located. See Act of Dec. 19, 1985, Pub. L. No. 99-190, Tit. VIII, § 8099, 99 Stat. 1219. As of November 1, 1986, however, Congress authorized the military once again to purchase liquor from the most competitive source regardless of location. See Act of Oct. 30, 1986, Pub. L. No. 99-591, Tit. IX, § 9090, 100 Stat. 3341-116; Act of Nov. 14, 1986, Pub. L. No. 99-661, Tit. III, § 313, 100 Stat. 3853. Hence, the labeling and reporting requirements imposed by appellants' regulations had no practical effect until November 1986.

[8] We have been informed by military officials reponsible for liquor procurement that these suppliers are the primary distillers or importers of many popular brands of distilled spirits, including Smirnoff vodka, Jose Cuervo tequila, Johnnie Walker Black Label and Red Label scotch, Tanqueray gin, Canadian Club whiskey, Courvoisier cognac, Jim Beam bourbon, Chivas Regal scotch, and Seagrams 7 Crown whiskey.

military that its prices would increase from $.85 to $20.50 per case in order to cover the additional costs of complying with the State's regulations.[9] In light of these developments, the official responsible for the military's procurement of liquor stated: "If the installations in North Dakota are forced to purchase their distilled spirits requirements from in-State sources in the future, it will cost the installations involved between $200,000 and $250,000 per year more than if the purchases are made from out-of-State distillers/importers" (J.A. 27). J.S. App. A4, A25-A26; J.A. 23, 25, 26.[10]

3. On November 26, 1986, the United States filed this action against appellants in the United States District Court for the District of North Dakota. Reciting the factual background set out above, the complaint alleged that the labeling and reporting requirements of the State's regulations interfere with the federal military's procurement of liquor, conflict with governing federal procurement law, and therefore violate the Supremacy Clause. The complaint sought a judgment declaring those regulations invalid and an injunction barring the State's enforcement of them as applied to military bases in North Dakota. J.S. App. A2; J.A. 3-8.

Appellants answered by contending that their regulations did not conflict with federal law. Appellants also argued that in any event the Twenty-first Amendment authorized the regulations as necessary "to prevent the unlawful diversion of alcohol from military enclaves into the internal commerce of North Dakota" (J.A. 11). The

[9] Kobrand imports Beefeaters gin, another popular brand of liquor.

[10] That official also estimated that the State's regulations would impose an additional cost of $50,000 for the military's immediate liquor procurement needs in November and December 1986 (J.A. 26-27).

parties thereafter entered into a stipulation of facts and filed cross-motions for summary judgment.[11]

4. The district court granted appellants' motion for summary judgment, concluding that the State's regulations do not conflict with the federal law requiring the military to purchase liquor at the "lowest cost" (J.S. App. A28). The court reasoned that the "state's regulations may have indirectly caused the price of out-of-state supplies of alcoholic beverages to increase, but they do not prevent the federal government from obtaining those beverages at the 'lowest cost.' The 'lowest cost' has merely increased" (*ibid.*).

Even if there were a conflict, the court stated, it would need to balance the State's authority to regulate liquor

[11] Appellants did not dispute the declaration submitted by the United States detailing the expected additional costs imposed by the regulations. Nor did appellants dispute that the five identified out-of-state suppliers would no longer service the bases in North Dakota and that another supplier would substantially raise its prices. See Declaration of Kim Keltz, Chief of the Special Contracts Branch, Air Force Nonappropriated Fund Purchasing Office, San Antonio, Texas (J.A. 25-27).

In support of their position, however, appellant submitted an affidavit of appellant Robert E. Hanson. That affidavit stated that "[v]arious distillers/suppliers have notified [him] that they intend to comply with [the regulations]" (J.A. 34). The affidavit did not identify those out-of-state suppliers. Moreover, the affidavit declared that Hanson, in his capacity as State Treasurer, is "aware of the diversion of alcoholic beverages from North Dakota federal enclaves into the state's domestic commerce in contravention of the state's established liquor distribution system" (J.A. 35). The affidavit did not identify any such diversions, although it mentioned two such incidents in Hawaii and Washington (J.A. 36). In a second affidavit, Hanson ultimately did mention two instances of apparent diversion of liquor from the North Dakota military bases. Hanson could neither confirm that those diversions actually occurred nor relate the amount of liquor involved. J.A. 49-52.

under the Twenty-first Amendment against the federal government's interests (J.S. App. A28-A29). In that regard, the court ruled that a State enjoys authority to impose regulations designed to prevent the unlawful diversion of liquor. The court accepted that proffered reason for the State's regulations, stating that it was not "pretextual,"[12] and therefore concluded that those regulations are "a valid exercise of [the State's] core power under the Twenty-first Amendment" (*id.* at A31). Turning to the competing interests, the court found that the State's "significant interest in preventing unlawful diversion of alcoholic beverages" clearly outweighed the federal government's interest "in keeping its costs down" (*ibid.*). Accordingly, the court held, alternatively, that the regulations at issue fall within the State's powers under the Twenty-first Amendment and are not barred by the Supremacy Clause (*ibid.*).

5. The court of appeals reversed (J.S. App. A1-A22). It first noted that Congress, in 10 U.S.C. 2488(a)(1) (Supp. V 1987), implemented "a longstanding policy of purchasing alcoholic beverages at the lowest available price and using the proceeds for the benefit of the welfare and morale of military personnel and their families" (J.S. App. A12). The court recognized the State's power under the Twenty-first Amendment, but observed that such power "reaches its limits when the state attempts to exercise that power over an instrumentality of the federal government itself" (*id.* at A10). Accordingly, the court concluded that the Twenty-first Amendment "provides no basis for regulating the means by which Congress has sought to order military liquor procurement and to provide for the welfare and morale activities of military personnel" (*id.* at A13).

[12] The court stated that "[w]hether or not there have been actual cases of unlawful diversion is not particularly relevant" (J.S. App. A31); see note 11, *supra*.

The court of appeals also weighed the competing interests at stake in concluding that federal law preempts the State's regulations (J.S. App. A13-A18). It recognized the State's "traditional power to regulate unlawful diversion of liquor in transit to the [military] bases" (*id.* at A17), but found that the State's efforts here impermissibly conflict with federal law. "Congress has mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities" (*id.* at A15). The court observed that the State's regulations will increase the military's annual liquor bill by more than $200,000, and that "the effect [of the regulations] in large part is to require the military to make purchases within the State—purchases that would not otherwise be competitive with out-of-state sources" (*id.* at A15-A16). The court held that "this result conflicts with Congress' desire for open competition designed to maximize revenue for welfare and morale activities" (*id.* at A16).

Chief Judge Lay dissented (J.A. App. A18-A22). He concluded that the State's regulations, designed solely "to prevent diversion of out-of-state liquor destined for military bases," fall within the State's power under the Twenty-First Amendment (*id.* at A22). In his view, under those circumstances, "[t]he federal government must accept the resulting increase in the cost of out-of-state liquor when it considers sources from which to purchase its liquor" (*ibid.*).

SUMMARY OF ARGUMENT

A. Federal law mandates that the military purchase alcoholic beverages (exclusive of beer and wine) to be re-

sold on military installations located in the United States "from the most competitive source, price and other factors considered * * *." 10 U.S.C. 2488(a)(1) (Supp. V 1987). As the statutory language suggests, the federal procurement scheme directs the military to purchase liquor for its facilities at the lowest available price. And as the legislative history of this provision makes plain, Congress, by this statute, reinstituted what until recently had been a longstanding military procurement policy—the purchase of alcoholic beverages from suppliers and distillers at the lowest available price, regardless of whether those sources are located in a base's home state, in order to maximize the profits that support non-appropriated morale, welfare, and recreational activities on military bases. By contrast, Congress has specified in related legislation that in-state suppliers must be used for the military's purchase of beer and wine and for the purchase of distilled spirits for bases in Alaska and Hawaii. These distinctions, evident on the face of the pertinent military procurement statutes, are not inadvertent. They should not be subjected to state nullification.

By enacting Section 2488(a)(1), Congress did not intend the military to consider price as only one of several equally competing factors in determining whether a particular liquor supplier is the "most competitive source." In choosing liquor suppliers, the military must take into account, among other factors, a supplier's reliability, service record, and access to particular brands. But as the court of appeals recognized (J.S. App. A12), and the legislative history of Section 2488(a)(1) confirms, Congress enacted the statute for the specific purpose of ensuring that the military purchases alcoholic beverages "in the most efficient and economic manner, without regard to the location of the source of the beverages, except as that location may affect cost * * *." S. Rep. No. 331, 99th Cong., 2d Sess. 283 (1986).

B. As applied to the two military bases in North Dakota, the federal procurement scheme under 10 U.S.C. 2488(a)(1) (Supp. V 1987) effectively requires military procurement officials to purchase liquor in bulk quantities directly from out-of-state distillers/suppliers because those suppliers offer lower prices than licensed wholesalers within the State. In the face of this carefully crafted framework, North Dakota's liquor regulations imposed burdensome labeling and reporting requirements on the military's out-of-state sources of liquor; those requirements will, in effect, force the military to obtain liquor for its North Dakota facilities from less competitive in-state sources at an increased annual cost of more than $200,000. This forced change in military procurement wrought by North Dakota's new regulatory regime is precisely what Congress sought to preclude by enacting Section 2488(a)(1), since the military is required by that measure to purchase alcoholic beverages from "the most competitive source" in order to maximize profits from the resale of those beverages—profits that are the principal source of funding for the Armed Services' non-appropriated morale, welfare, and recreational programs on military installations.

Under the Supremacy Clause, federal law preempts State regulation where the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). That well-established principle applies here. North Dakota's protectionist regulations plainly interfere with and thwart the federal procurement scheme mandating "open competition" (J.S. App. A16). As a result, the State's regulatory efforts must fail under the Supremacy Clause.

Moreover, a longstanding companion principle under the Supremacy Clause, namely "that the activities of the

Federal Government are free from regulation by any state," *Mayo* v. *United States*, 319 U.S. 441, 445 (1943), likewise bars the State's regulatory efforts over the military's procurement of alcoholic beverages. In decisions such as *Mayo* v. *United States, supra, Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956), and *Paul* v. *United States*, 371 U.S. 245 (1963), this Court applied that Supremacy Clause principle in striking down States' efforts to interfere with federal activities. Those decisions compel the conclusion that North Dakota may not regulate the military's procurement of distilled spirits for its installations. Just as the California minimum price regulation in *Paul* collided with the applicable federal procurement law requiring the "most advantageous contract—price, quality, and other factors considered," 371 U.S. at 252, the restrictions imposed by North Dakota upon the military's procurement of alcoholic beverages clash with federal law governing the military's procurement of liquor.

North Dakota's regulatory efforts may not evade this Supremacy Clause principle on the basis that the State's regulations apply only to third-party suppliers who happen to do business with the government. First, as is apparent from decisions such as *Paul* and *Leslie Miller, Inc.*, the fact that a State's regulation applies by its terms only to the federal government's suppliers (as opposed to the government itself) does not free that regulation from the constraints of the Supremacy Clause. Second, although nominally aimed at out-of-state suppliers, North Dakota's regulations are, in point of fact, designed to regulate the federal enclaves' procurement of alcoholic beverages. Finally, although the district court stated that "the purpose advanced by the State [for its regulations] does not appear to be pretextual" (J.S. App. A31), and the court of appeals did not quarrel with that assessment (*id.* at A15), a close examination of North Dakota's regulatory scheme

leads to the contrary conclusion—appellants imposed the regulations for the very purpose of forcing the military to purchase its alcoholic beverages from in-state wholesalers subject to the State's taxing authority.

C. The Twenty-first Amendment does not authorize North Dakota to interfere with the federal government's exclusive authority to regulate military procurement of distilled spirits. As this Court has held, that Amendment generally permits the States to regulate and tax private commerce in alcoholic beverages in a manner that, without the Amendment, would be prohibited under the Commerce Clause. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). But even in this limited area, the Court has rejected the proposition that the Twenty-first Amendment renders the Commerce Clause inoperative simply because the State seeks to regulate alcoholic beverages. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964). And outside the context of the Commerce Clause, the Court has made clear that "the relevance of the Twenty-first Amendment to other Constitutional provisions becomes increasingly doubtful." *Craig* v. *Boren*, 429 U.S. at 206.

In light of the limited scope of the Twenty-first Amendment with respect to competing constitutional commands, this Court has held that the immunity of federal activities and property from state control or regulation remains wholly unaffected by the Amendment. See *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 537-538 (1938). And the Court's companion decisions in *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1973), and 421 U.S. 599 (1975), which struck down Mississippi's efforts to regulate shipments of liquor destined for both exclusive and concurrent jurisdiction military bases located in the State, establish beyond doubt that the Twenty-first Amendment does not confer authority on the States to

regulate the federal government's procurement of alcoholic beverages. Here, North Dakota's regulations conflict with federal procurement law and with federal regulation of military enclaves; the State's regulatory regime thus does not survive scrutiny under the Supremacy Clause. Those regulations may not be resurrected under the Twenty-first Amendment.

ARGUMENT

THE STATE OF NORTH DAKOTA'S REGULATION OF THE UNITED STATES MILITARY'S PURCHASE OF ALCOHOLIC BEVERAGES FROM OUT-OF-STATE SUPPLIERS FOR ITS NORTH DAKOTA INSTALLATIONS UNCONSTITUTIONALLY INTERFERES WITH FEDERAL PROCUREMENT OF THOSE PRODUCTS

A. Federal Law Requires The Military To Purchase Alcoholic Beverages At The Lowest Available Price In Order To Maximize Profits To Support Morale, Welfare, And Recreational Activities On Military Bases

1. In 10 U.S.C. 2488(a)(1) (Supp. V 1987), Congress mandated that the military purchase alcoholic beverages (exclusive of beer and wine) to be resold on military installations located in the United States "from the most competitive source, price and other factors considered * * *."[13] As the statutory language suggests, the federal procurement scheme directs the military to purchase liquor for NFIs and other facilities at the lowest available price. In other words, the military, operating as a rational

[13] In enacting the statute, Congress, in effect, codified the provisions of Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4), which similarly states that the purchase of all alcoholic beverages for resale on any military installation "shall be in a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered."

business firm, must follow practices designed to maximize profits by purchasing at the lowest prices the products that consumers demand. This straightforward reading of the statute is hardly surprising. The federal procurement regulation at issue in *Paul* v. *United States*, 371 U.S. 245 (1963), for example, directed officials to buy milk under "the most advantageous contract—price, quality, and other factors considered" (*id.* at 252 (internal quotation marks omitted)). This Court construed that regulation as "command[ing] * * * federal officials to procure supplies at the lowest cost to the United States" (*id.* at 253).

2. The legislative purpose of Section 2488(a)(1) becomes all the more manifest when its language is contrasted with that of Section 2488(a)(2), requiring in-state purchases of beer and wine, and with that of contemporaneously enacted provisions requiring in-state purchases of distilled spirits for bases in Alaska and Hawaii (see pp. 20-21 & n.15, *infra*). Moreover, as the court of appeals found (J.S. App. A12), the legislative history of Section 2488 confirms that Congress, by this statute, reinstituted what until recently had been a longstanding military procurement policy—the purchase of alcoholic beverages at the lowest available price in order to maximize the profits that support non-appropriated morale, welfare, and recreational (MWR) activities on military bases.

a. In 1985, the House of Representatives, by voice vote, passed an amendment to the Department of Defense authorization bill for fiscal year 1986. That amendment required the military to purchase alcoholic beverages to be resold on military installations from suppliers and distributors in the State in which an installation was located. The House amendment, however, drew opposition in the Senate. Senate opponents of this in-state pur-

chasing requirement contended that it would increase the military's costs of purchasing alcoholic beverages for its NFI facilities by as much as $30 million annually. See, *e.g.*, 131 Cong. Rec. 35,490-35,491 (1985) (statement of Sen. Glenn). As Senator Kennedy, one of the sponsors of the Senate's amendment to delete the House provision, pointed out:

> While these dollar amounts may not be very significant in comparison with the other sums the Senate will be discussing in the defense appropriation bill, these sums are of enormous importance to the services' morale, welfare, and recreation programs. These MWR funds depend heavily on revenues obtained from sales of alcohol on installations, and if installations were required to purchase their alcohol requirements from within the State in which they are located, the costs will skyrocket and the MWR funds will be correspondingly depleted.

131 Cong. Rec. 35,492 (1985).

The Senate succeeded in deleting the in-state purchasing requirement from the Department of Defense authorization bill for fiscal year 1986. Nevertheless, Congress included such a provision in that fiscal year's Department of Defense Appropriations Act. See Act of Dec. 19, 1985, Pub. L. No. 99-190, Tit. VIII, § 8099, 99 Stat. 1219. Consequently, from December 1985 through October 1986, all alcoholic beverages for military bases had to be procured in the State in which the particular base was located.

b. The following year, Congress again confronted the issue of requiring military bases to purchase liquor only from in-state suppliers. The Senate Armed Services Committee decided to drop that requirement from the National

Defense Authorization bill for fiscal year 1987. The Committee explained that it

> continues to object to such a requirement and has included a provision mandating that purchases of such alcoholic beverages for resale be made in the most efficient and economic manner, without regard to the location of the source of the beverage, except as that location may affect cost. * * * [T]he committee believes that procurement of alcoholic beverage[s] for resale should be subjected to the same favorable effects of competition as is useful in the procurement of other goods and services. Additionally, the committee does not believe it appropriate to impose upon the Department, or the morale and welfare activities of the Department, a requirement which will result in additional costs of tens of millions of dollars, caused by the imposition of indirect State taxation in [*sic*] the Federal government and the lack of competition.

S. Rep. No. 331, 99th Cong., 2d Sess. 283 (1986).

The House Armed Services Committee agreed to delete the in-state purchasing requirement for distilled spirits, but decided to include a provision which retained that requirement for beer and wine. The House Committee noted that it was customary for the military to buy beer and wine from local sources and that, accordingly, retaining the in-state purchasing requirement for those beverages would have little effect on the military's overall cost of procuring liquor for its facilities. H.R. Rep. No. 718, 99th Cong., 2d Sess. 183-184 (1986). On the other hand, the House Committee heeded the military's estimate that the in-state purchasing requirement "will raise its costs for alcoholic beverages by $20 million per year * * *[,] increased costs [that] relate almost entirely to distilled spirits that were

previously purchased directly from manufacturers." H.R. Rep. No. 718, *supra*, at 183. The House Committee thus joined its Senate colleagues in recommending "a return to competitive procurement of alcoholic beverages," namely, "allow[ing] the [military] to return to direct procurement of distilled spirits—the acceptable industry practice." H.R. Rep. No. 718, *supra*, at 184.

The full House agreed with the Armed Services Committee's recommendation on this point, specifically voting down a proposed amendment to change it.[14] On the Senate floor, however, Senate Andrews of North Dakota also sponsored an amendment to reinstitute the in-state purchasing requirement for all alcoholic beverages, and that amendment was adopted by a voice vote. See 132 Cong. Rec. 20,219-20,223 (1986). The House and Senate conferees then adopted instead the Committee-sponsored House provisions retaining the in-state purchasing requirement only for beer and wine and directing the military to buy distilled spirits at the lowest price available. See H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 39, 464 (1986). Several weeks later, Congress passed the 1987 National Defense Authorization bill and the procurement provision was signed into law. See Act of Nov. 14, 1986, Pub. L. No. 99-661, Tit. III, § 313, 100 Stat. 3853 (codified at 10 U.S.C. 2488(a) (Supp. V 1987)). Significantly, legislation enacted less than three weeks earlier required the military to purchase from in-state sources all alcoholic beverages for installations located in the States of Alaska and

[14] On the House floor, Representative Robinson of Arkansas had sponsored an amendment to reinstitute the in-state purchasing requirement for all alcoholic beverages. See 132 Cong. Rec. 21,225 (1986). That amendment, which Representative Dorgan of North Dakota supported (see 132 Cong. Rec. 21,639 (1986)), was defeated by a recorded vote (see 132 Cong. Rec. 21,638-21,640 (1986)).

Hawaii, while explicitly providing otherwise for bases located located in the contiguous 48 States and the District of Columbia.[15] See Act of Oct. 30, 1986, Pub. L. No. 99-591, Tit. IX, § 9090, 100 Stat. 3341-116.

3. In sum, with the exception of legislation relating to bases located in Alaska and Hawaii, Congress has made no pertinent change in the federal law governing the military's procurement of alcoholic beverages since the enactment of 10 U.S.C. 2488(a). See, *e.g.*, Act of Oct. 1, 1988, Pub. L. No. 100-463, Tit. VIII, § 8122, 102 Stat. 2270-40. Accordingly, Congress has maintained the policy of requiring the military to purchase liquor for its NFI facilities from suppliers and distillers at the lowest available price, regardless of whether those sources are located in a base's home state. In contending otherwise, appellants and their supporting amici are asking this

[15] That statute provides in pertinent part:

> None of the funds appropriated by this Act shall be used for the support of any nonappropriated fund activity of the Department of Defense that procures malt beverages and wine with nonappropriated funds for resale * * * on a military installation located in the United States, unless such malt beverages and wine are procured in that State, or in the District of Columbia, within the District of Columbia, in which the military installation is located: *Provided*, That in a case in which a military installation is located in more than one State, purchases may be made in any State in which the installation is located: *Provided further*, That such local procurement requirements for malt beverages and wine shall apply to all alcoholic beverages for military installations in states which are not contiguous with another state: *Provided further*, That alcoholic beverages other than wine and malt beverages in contiguous states and the District of Columbia shall be procured from the most competitive source, price and other factors considered.

Act of Oct. 30, 1986, Pub. L. No. 99-591, Tit. IX, § 9090, 100 Stat. 3341-116.

Court effectively to nullify the very distinctions Congress deliberately drew between the acquisition of beer and wine and the acquisition of distilled spirits and, with respect to the latter, between acquisitions for bases in Alaska and Hawaii and those for bases in the 48 other States. Those telling differences on the face of closely related procurement provisions are not drafting errors; they are clear distinctions that Congress purposefully adopted. Those distinctions should be fully honored by the courts to achieve their intended pro-competitive purpose. As we have recounted (see p. 20 & n. 14, *supra*), members of the House and Senate from North Dakota tried, but failed, to eliminate those distinctions on the floor of Congress. Under the Supremacy Clause, it is not the proper role of the State to attempt through regulation to nullify those federal statutory distinctions, in whole or in part.

To be sure, under the federal procurement scheme, price is the predominant, but not the sole, determinant. In choosing liquor suppliers, the military must also take into account, among other factors, a supplier's reliability, service record, and access to particular brands. But as the court of appeals recognized, "the history of military alcohol procurement reflects a longstanding policy of purchasing alcoholic beverages at the lowest available price and using the proceeds for the benefit of the welfare and morale of military personnel and their families" (J.A. App. A12); see *United States* v. *South Carolina*, 578 F. Supp. 549, 553 (D.S.C. 1983). Indeed, as detailed above, the legislative history of Section 2488(a)(1) makes plain that Congress enacted the statute for the specific purpose of ensuring that the military purchases its alcoholic beverages "in the most efficient and economic manner, without regard to the location of the source of the beverages, except as that location may affect cost * * *."

S. Rep. No. 331, *supra*, at 283 (1986); see H.R. Rep. No 718, *supra*, at 183-184.[16]

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[16] Without support in the statutory language or history, appellants (Br. 16-17, 22), joined by the National Beer Wholesalers' Association, Inc. (Br. 6-7 & n.6), the National Alcoholic Beverage Control Association, et al. (Br. 9-10), and the National Conference of State Legislatures, et al. (Br. 16), as amici curiae, appear to suggest that federal law itself directs the military to consider complying with state liquor control laws as a factor overriding price considerations in choosing its suppliers for alcoholic beverages. That notion is not only antithetical to the federal statutory purpose, it flies in the face of the controlling federal regulation, Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4). That regulation provides that, although the Department of Defense will cooperate with state and local officials regarding alcoholic beverages, the purchase of all alcoholic beverages for resale at any military facility shall be

> under such conditions as shall obtain for the government the most advantageous contract, price and other factors considered. *These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.*

Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (emphasis added).

The National Conference of State Legislatures, et al. (Br. 14-15), as amici curiae, seek to blunt the force of that regulation by pointing out that the Secretary of Defense promulgated it not under Section 2488(a)(1), but rather under 50 U.S.C. App. 473. That observation, although factually accurate, see note 3, *supra*. is legally irrelevant, since it is undisputed that the Secretary's regulation has the force of law, and is wholly consistent with Congress's statutory directive.

B. North Dakota's Liquor Regulations Are Invalid Under The Supremacy Clause Since They Prevent The United States Military From Obtaining Alcoholic Beverages From The Most Competitive Source, As Required By Federal Law

1. a. As we have explained, under governing federal law,[17] the military must purchase liquor from the "most competitive source." As applied to the two military bases in North Dakota, that federal scheme requires military procurement officials to purchase the liquor in bulk quantities directly from out-of-state distillers/suppliers because those suppliers offer lower prices than licensed wholesalers within the State. See J.A. 5, 25; see also note 4, *supra*. By virtue of the added administrative burdens and costs of complying with the State's labeling and reporting requirements, however, five major out-of-state suppliers informed the military that they would no longer ship liquor to the bases in North Dakota. Another major out-of-state supplier advised the military that it would increase its prices on North Dakota sales by as much as $20.50 per case in order to recover the additional costs of complying with the state-imposed regime. J.S. App. A4. In sum, the record shows that the State's regulations, if left intact, will effectively force the military to obtain liquor for its North Dakota facilities from less competitive in-state sources at an increased annual cost of more than $200,000. J.S. App. A4, A15-A16, A25-A26; J.A. 25-27.

This forced change in military procurement is precisely what Congress sought to preclude by enacting 10 U.S.C. 2488(a)(1). Congress directed that distilled spirits be procured from "the most competitive source" in order to maximize profits from the resale of those beverages—profits that are the principal source of funding for the Armed

[17] 10 U.S.C. 2488(a)(1) (Supp. V 1987); see Department of Defense Armed Services Military Club and Package Store Regulation 1015.3-R, ch. 4, § C (codified at 32 C.F.R. 261.4).

Services' non-appropriated MWR programs on military installations. Congress was acutely aware that the military's annual cost of purchasing alcoholic beverages could increase by as much as $30 million if the military were required to purchase its liquor from less competitive in-state sources, and was concerned that such increased cost would have a devastating effect on the funding of the MWR programs—programs that do not receive appropriated funds. See, *e.g.*, S. Rep. No. 331, *supra*, at 283; 131 Cong. Rec. 35,490-35,491 (1985) (statement of Sen. Glenn); *id.* at 35,491-35,492 (statement of Sen. Kennedy).

b. The Court has long held that, under the Supremacy Clause, federal law preempts state regulation where the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *e.g.*, *California* v. *ARC America Corp.*, 109 S. Ct. 1661, 1665 (1989); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984). That established principle applies with full force in this case. Under Section 2488(a)(1), as the court of appeals correctly observed, "Congress has mandated that the military procure liquor on a competitive basis in order to maximize profits for the support of welfare and morale activities" (J.S. App. A15). That is a legitimate federal legislative purpose which fully justifies pro tanto displacement of state regulatory authority over a subject matter otherwise principally regulated by the States. Cf. *United States* v. *Oregon*, 366 U.S. 643 (1961) (upholding federal statutory provision that estate of a veteran who dies in a VA hospital intestate and without legal heirs shall escheat to the United States, notwithstanding contrary state law on devolution of property).

Here, as detailed above, the record shows that the State's regulations will, in effect, increase the military's

annual liquor bill by more than $200,000 and "require the military to make purchases within the State—purchases that would not otherwise be competitive with out-of-state sources" (J.S. App. A15-A16). In these circumstances, the State's regulations plainly interfere with and thwart the federal procurement scheme mandating "open competition" (*id.* at A16). Under the Supremacy Clause, the State's regulatory efforts must fall.

2. a. A longstanding companion principle under the Supremacy Clause likewise bars the State's attempt to regulate the military's procurement of alcoholic beverages. As this Court has expained:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. *A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.* No other adjustment of competing enactments or legal principles is possible.

Mayo v. *United States*, 319 U.S. 441, 445 (1943) (footnote omitted; emphasis added). Thus, putting aside for the moment the potential impact of the Twenty-first Amendment (see pp. 35-42, *infra*), there can be no serious doubt that the constitutional command of the Supremacy Clause, as construed by this Court since *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), together with the specific constitutional authority to provide for, maintain, and regulate

the nation's military forces,[18] would bar North Dakota from directly regulating the military's procurement of alcoholic beverages.[19] A close look at this case reveals that the State's liquor regulations represent a thinly veiled effort to accomplish that forbidden goal.

The corollary Supremacy Clause principle, as the Court's decisions show, imposes limits on state power as regards the federal government that extend well beyond taxation, the issue in *M'Culloch* v. *Maryland*. In *Johnson* v. *Maryland*, 254 U.S. 51, 55-57 (1920), for example, the Court held that Maryland could not require a post office employee to obtain a state driver's license in order to drive a postal truck. In so holding, the Court viewed the principle expressed in *M'Culloch* and succeeding cases as providing to "the instruments of the United States [an immunity] from state control in the performance of their duties." 254 U.S. at 57. Similarly, in *Mayo* v. *United States, supra,* the Court made clear that the Supremacy Clause precludes any State from attempting to regulate the activities of the federal government. There, the Court struck down a Florida law insofar as it would have required agents of the United States Department of Agriculture, as a condition of distributing fertilizer under a federal statute, to submit the fertilizer for state inspection and pay the accompanying inspection fee. 319 U.S. at 444-448. Such attempted state regulation of federal activities, the Court concluded, was fundamentally at odds with Supremacy Clause principles and thus the federal government's "inherent freedom continues" (*id.* at 448). And in *Public Utilities Comm'n* v.

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[18] See U.S. Const. Art. I, § 8, Cls. 12, 14.

[19] Appellants (Br. 18-19 & n.5), together with the National Beer Wholesalers' Association, Inc. (Br. 6-7 & n.6), the National Alcoholic Beverage Control Association, et al. (Br. 9-11), and the National Conference of State Legislatures, et al. (Br. 17-19), as amici curiae, appear to concede as much.

United States, 355 U.S. 534 (1958), the Court held that California could not prohibit common carriers from transporting federal government property at rates lower than those approved by the State's Public Utilities Commission. The State's law, the Court concluded, impermissibly interfered with federal law requiring negotiated rates and the use of the "least costly means of transportation." *Id.* at 542. See also *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963).

In this same vein, the Court has specifically vindicated Congress's exclusive right under Article I, Section 8 of the Constitution to authorize the military to procure goods and services from whatever sources it chooses, free of state limitations or restrictions. In *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956), for example, the Air Force had awarded a base construction contract to a private firm under Section 3 of the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 23, 41 U.S.C. 152 (1952), providing that awards on advertised bids "shall be made * * * to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered * * *" (352 U.S. at 188 (internal quotation marks omitted)). The State then instituted proceedings against the contractor for its failure to obtain a license before executing the contract and starting to build, as required by state law. The Court rebuffed that regulatory intrusion, concluding that the state licensing standards, designed to ensure a contractor's reliability, created "a virtual power of review over the federal determination of 'responsibility' " (*id.* at 190). Accordingly, following the rationale of *Johnson* v. *Maryland, supra*, the Court held that the State had no authority to regulate the Air Force's awarding of the base construction contract, since application of state law would "frustrate the

expressed federal policy of selecting the lowest responsible bidder" (352 U.S. at 190).

More recently, the case of *Paul* v. *United States*, 371 U.S. 245 (1963), involved California's efforts to apply its minimum milk price regulation to military bases' milk purchases, where the applicable federal regulation required procurement by the method that would "obtain for the Government the most advantageous contract—price, quality, and other factors considered" (*id.* at 252 (internal quotation marks and citation omitted)). The Court struck down the State's regulation under the Supremacy Clause, recognizing that the "collision between the federal policy of negotiated prices and the state policy of regulated prices is * * * clear and and acute" (*id.* at 253), and concluding that the State's regulation precluded the military from complying with federal law to obtain milk at the lowest cost. As the Court explained:

> While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States, by having a state officer fix the price on the basis of factors not specified in the federal law.

Ibid.

b. This Court's decisions compel the conclusion that North Dakota may not regulate the military's procurement of distilled spirits for its installations. Just as the California minimum price regulation in *Paul* collided with the applicable federal procurement law requiring the "most advantageous contract—price, quality, and other factors considered," the restrictions imposed by North Dakota upon the military's procurement of alcoholic beverages clash with federal law governing the military's procurement of liquor. Congress has mandated that the military

obtain its liquor from the "most competitive source, price and other factors considered" (10 U.S.C. 2488(a)(1) (Supp. V 1987)). Yet in the face of this federal directive, the State seeks to impose labeling and reporting requirements on the military's out-of-state suppliers of distilled spirits that will essentially eliminate those suppliers as available sources of those products. As a result, the State's regulations will, in effect, require the military to procure those beverages locally at an annual increased cost of more than $200,000. In these circumstances, as the court of appeals correctly held (J.S. App. A11-A18), the Supremacy Clause invalidates the State's liquor regulations directed solely to procurement by the federal government, just as it did the attempted state regulation of federal activities in *Paul, Leslie Miller, Inc., Mayo,* and *Public Utilities Comm'n.*

3. Appellants (Br. 17-20), joined by the National Beer Wholesalers' Association, Inc. (Br. 9-14)), the National Alcoholic Beverage Control Association, et al. (Br. 7-9), and the National Conference of State Legislatures, et al. (Br. 17-19), as amici curiae, contend that this case does not even implicate the federal government's constitutional immunity from state regulation of its activities since North Dakota's regulations apply only to third-party suppliers who do business with the federal government. In their view, the fact that suppliers may choose to treat the regulations as so onerous as to cause them to stop dealing with the military entirely, or to raise their prices on military sales, does not implicate Supremacy Clause principles. For several reasons, that argument misses the mark.

a. First, as is apparent from this Court's decisions in *Paul, Leslie Miller, Inc.,* and *Public Utilities Comm'n*, the fact that a State's regulation applies by its terms to the federal government's suppliers, as opposed to the federal government itself, does not free that regulation from the

constraints of the Supremacy Clause. In each of those decisions, the Court struck down on Supremacy Clause grounds state laws that were both applicable to and enforceable against only third parties with whom the government did business. The Court thus recognized that a State's attempted regulation of the conditions or terms upon which the United States chooses to do business with a third party contravenes the Supremacy Clause, notwithstanding the fact that the State ostensibly has aimed its regulatory efforts at the activities of the third party. Here, North Dakota's liquor regulations are just as much an impermissible attempt to regulate the activities of the federal government as were the ill-fated regulatory efforts in *Paul, Leslie Miller, Inc.,* and *Public Utilities Comm'n.*

b. Second, although nominally aimed at out-of-state suppliers, North Dakota's regulations admittedly are designed to regulate the federal enclaves' procurement and handling of alcoholic beverages.[20] The State has contended throughout the litigation that it imposed the labeling and reporting requirements "in order to prevent the unlawful diversion of liquor, either en route to the military enclaves or off the enclaves after delivery, into the state's domestic commerce" (J.S. 9). Indeed, appellants have now made clear that the real targets of their regulatory efforts are the State's two federal military installations, not the military's out-of-state suppliers: "The State's significant interest underlying the regulations challenged here is predicated on the fact that liquor is diverted off the military bases into the State's commerce. The NFIs sell packaged liquor to authorized purchasers who reside off-

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[20] By its express terms, the State's labeling regulation applies only to sales by out-of-state suppliers to the federal military installations located within the State. See N.D. Admin. Code § 84-02-01-05(7) (1986) (quoted p. 4, *supra*).

base. This practice alone guarantees that liquor will be diverted into the State's territory * * *." (Appellants' Br. 21).

In other words, appellants object, so they claim, to the military's practice of selling packaged alcoholic beverages (obtained from out-of-state sources) to military personnel who reside off-base, and seek through the State's regulations to put a stop to, or at least inhibit, this practice. But in our federal system it is simply not the province of the States to regulate activities of the United States or its instrumentalities. This Court made that point with unmistakable clarity in *Mayo* v. *United States,* 319 U.S. at 445, stating that "the activities of the Federal Government are free from regulation by any state." And that constitutional principle, as the Court has held, obtains with particular force where a State seeks to regulate the government's exclusive authority over military procurement derived from Article I, Section 8 of the Constitution. *E.g., Paul* v. *United States,* 371 U.S. at 253; *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. at 190.[21]

[21] Appellants (Br. 18-19), together with the National Alcoholic Beverage Control Association, et al. (Br. 7), and the National Conference of State Legislatures, et al. (Br. 12-14 & n.13), as amici curiae, mistakenly rely on *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261, 269-275 (1943). In that case, the Court upheld a State's refusal to renew the license of a milk dealer who had sold milk to a military installation at prices below those prescribed by state law. In holding that state law did not impermissibly interfere with federal procurement law, the Court made clear that the then-applicable federal regulation, which otherwise called for competitive procurement, suspended that requirement "when the price is fixed by federal, state, municipal or other competent legal authority" (318 U.S. at 277 (internal quotation marks and citation omitted)). In other words, the State's regulatory efforts had not been preempted because Congress effectively had implemented a "hands off policy" concerning state minimum price laws (*id.* at 278). By contrast, here, as in *Paul* v. *United States*, 371 U.S. at 254-255 (implementing a procurement policy revised by Congress after *Penn Dairies*), applicable federal law requires, without exception, that the military's procurement proceed on a competitive basis. Thus, as the court of appeals correctly concluded (J.S. App. A16-A17), *Penn Dairies* does not save North Dakota's regulations.

Furthermore, the Secretary of Defense, under his rule-making authority conferred by 50 U.S.C. App. 473, has promulgated a regulation that specifically states that military package stores, such as the NFIs located on the two bases in North Dakota, "shall provide the sale of alcoholic beverages purchased for off-premise consumption by authorized patrons * * *." 47 Fed. Reg. 34,533 (1982) (codified at 32 C.F.R. 261.3). Accordingly, to the extent the State's regulations are aimed at preventing, inhibiting, or burdening the military from selling packaged alcoholic beverages to military personnel who reside off-base (where, as here, consumption of alcoholic beverages off-base is not in itself prohibited by the State), the regulations directly contravene federal law and must, accordingly, fall by virtue of the Supremacy Clause.[22]

c. Finally, although the district court indicated that "the purpose advanced by the State [for its regulations] does not appear to be pretextual" (J.S. App. A31), and the court of appeals accepted that assessment (*id.* at A15), a close examination of North Dakota's regulatory scheme leads to the contrary conclusion—appellants imposed the regulations in order to force the military to purchase more of its alcoholic beverages from in-state wholesalers subject to the State's taxing authority.

[22] For that reason as well, this case is readily distinguishable from the hypothetical examples cited by appellants (Br. 17-18) and the National Conference of State Legislatures, et al. (Br. 12), as amici curiae, where a particular State's health or safety regulation applies equally to all firms, whether owned by private parties, state or local governments, or the United States.

Appellants now assert (Br. 21) that the liquor regulations' principal purpose is to put a stop to the diversion of liquor from the two federal enclaves into the State's commerce that results from the military's practice of selling packaged alcoholic beverages to military personnel who reside off-base. The military facilities, however, not only sell packaged liquor purchased from out-of-state suppliers; those facilities also sell packaged beer and wine that, as required by federal law, are obtained from licensed wholesalers located in the State, see 10 U.S.C. 2488(a)(2) (Supp. V 1987), and, if prices are competitive, the facilities are entirely at liberty to purchase packaged liquor from such local wholesalers. But the State's labeling and reporting requirements apply only to liquor obtained by the federal enclaves from out-of-state suppliers. The State's wholesalers, unlike out-of-state suppliers, are not required to affix special labels to the alcoholic beverages they sell to the military installations stating that the items must be consumed on those premises, or to file monthly reports concerning their sales. This disparate treatment of out-of-state liquor suppliers and in-state wholesalers is telling evidence that the real aim of the State's regulations is not to prevent the diversion of alcoholic beverages from the federal enclaves into the State's commerce. To the contrary, those regulations seek to compel the military to purchase its alcoholic beverages from in-state wholesalers—transactions in which the State has a direct pecuniary interest since it imposes a tax on such wholesale transactions. See N.D. Cent. Code §§ 5-03-04 and 5-03-07 (1975).

C. The Twenty-First Amendment Does Not Authorize The State Of North Dakota To Interfere With The Federal Government's Exclusive Authority To Regulate Military Procurement Of Alcoholic Beverages

Appellants (Br. 12-14), again joined by the National Beer Wholesalers' Association, Inc. (Br. 14-28), the National Alcoholic Beverage Control Association, et al. (Br. 5-7), and the National Conference of State Legislatures, et al. (Br. 19-22), as amici curiae, seek to vindicate North Dakota's interference with the military's procurement of alcoholic beverages on the basis of the State's reserved power under the Twenty-first Amendment to regulate intrastate commerce in alcoholic beverages. To be sure, as the court of appeals fully recognized, "the state has always had the right pursuant to its police power to take reasonable measures to prevent the unlawful diversion of liquor into its stream of commerce" (J.S. App. A16 (citations omitted)). But contrary to the assertion of the State and amici, the Twenty-first Amendment does not authorize the States to pursue that objective by regulating federal procurement of liquor to be supplied to federal military enclaves.[23]

1. Section 2 of the Twenty-first Amendment[24] generally permits the States to regulate and tax private commerce in alcoholic beverages in a manner that, without the Amendment, would be prohibited under the Commerce

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[23] To the extent the real aim of the State's regulations is to force the military to purchase its alcoholic beverages from in-state sources and thereby to increase the State's liquor tax revenues, appellants and amici can take no refuge in the Twenty-first Amendment.

[24] Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Clause as a burden on interstate commerce. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). Thus, in *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62-63 (1936), the Court held that the Twenty-first Amendment permitted California to impose a license fee upon private parties wishing to import beer into the State, although the Commerce Clause would otherwise have barred such a fee.

But even in this limited area, the Court has rejected the proposition that the Twenty-first Amendment renders the Commerce Clause inoperative simply because the State seeks to regulate alcoholic beverages.[25] "To draw a conclusion • • • that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964). Thus, in *Hostetter*, the Court held that New York had no authority to interfere with the sale of liquor at a local airport for delivery to consumers in foreign countries, where the airport was under the supervision of the Bureau of Customs (now the Customs Service). And the Court there noted that to conclude that Congress had retained no regulatory power over commerce in alcoholic beverages would be "patently bizarre and • • • demonstrably incorrect" (377 U.S. at 332). See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274 (1984); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); see also *Healy* v. *Beer Institute, Inc.*, No. 88-449 (June 19, 1989), slip op. 17-19.

2. As this Court has made clear, "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." *Craig* v. *Boren*, 429 U.S. at 206. For example, in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964), Kentucky attempted to tax the importation of Scotch whiskey into the State for later sale throughout the United States. Recognizing that the tax violated the Export-Import Clause (U.S. Const. Art. I, § 10, Cl. 2), the State argued that the Twenty-first Amendment nevertheless authorized its imposition. In rejecting the State's argument, the Court distinguished those cases involving conflicts between state liquor laws and the Commerce Clause and noted that it had never so much as intimated that the Twenty-first Amendment permits what the Export-Import Clause explicitly forbids (377 U.S. at 344). Indeed, the Court emphasized:

> Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion. • • • [N]ow that the claim for the first time is squarely presented, we expressly reject it.

Id. at 345-346.

Similarly, the Twenty-first Amendment has not insulated state liquor provisions from the commands of the Fourteenth Amendment. In striking down under the Equal Protection Clause a state law prohibiting the sale of 3.2% beer to males under 21 years of age, but permitting such sales to women aged 18 years or over, the Court in *Craig* v. *Boren, supra,* specifically held that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case" (429 U.S. at 209). And in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436-439 (1971), where a state statute authorized the posting in a public place of the names of excessive drinkers, the Court held that the Twenty-first

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[25] The Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 274-276 (1984), even casts doubt on the continuing vitality of *Young's Market Co.*

Amendment could not save that statute from violating the Due Process Clause, where such persons were not first given notice and an opportunity to be heard.[26]

3. In light of the limited scope of the Twenty-first Amendment with respect to competing constitutional commands, this Court has held that the immunity of federal activities and property from state control or regulation remains wholly unaffected by the Amendment. In *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), for example, California sought to apply its liquor licensing requirements to a corporation selling alcoholic beverages in Yosemite National Park under a lease from the United States. The Court squarely held that the Twenty-first Amendment did not give the State jurisdiction to regulate the sale of alcoholic beverages on an enclave of exclusive federal jurisdiction, and thus the State could not apply its regulations. 304 U.S. at 537-538.

In more recent decisions involving Mississippi's efforts to regulate military facilities' procurement of alcoholic beverages, the Court has made clear that the rationale of

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[26] Furthermore, the Court has not given controlling weight to state law when resolving conflicts between State regulation of alcoholic beverages under the Twenty-first Amendment and competing federal law. Thus, in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), the State, which had established 19 as its legal drinking age for 3.2% beer, challenged a federal law that required the Secretary of Transportation to withhold a percentage of federal highway funds available to the State if the State did not raise its minimum drinking age to 21. The federal government defended the provision as a valid exercise of Congress's spending power; the State relied upon its exclusive right, under the Twenty-first Amendment, to set the drinking age for its residents. 483 U.S. at 205-206. In upholding the federal law, the Court concluded that the Twenty-first Amendment could not nullify Congress's valid exercise of its spending power (*id.* at 209-212). See also *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976) (recognizing Congress's broad power under the Property Clause (U.S. Const. Art. IV, § 3, Cl. 2)).

Collins is not limited to situations where the federal government exercises exclusive jurisdiction. In *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1973) (*Mississippi Tax Comm'n I*), Mississippi sought to compel the four military facilities located in that State to purchase liquor either from the State Tax Commission (at a 17 or 20% markup) or from distillers who were required to collect and remit the same markup to the State. Since two of the four bases were areas of exclusive federal jurisdiction, the case initially turned on the resolution of a conflict between the State's asserted power under the Twenty-first Amendment and the federal government's exclusive authority over such bases under Article I, Section 8, Clause 17 of the Constitution. See 412 U.S. at 364-368. Following *Collins*, the Court held that "the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction" (*id.* at 375). Indeed, the Court recognized that a different result would not obtain even if it were assumed that some of the liquor purchased on the installations would be consumed off-base and hence within the State's jurisdiction (*id.* at 376-377).

The Court, however, remanded the case for consideration, among other issues, of whether the Twenty-first Amendment empowers the State to regulate shipments of liquor destined for its two concurrent jurisdiction bases. See 412 U.S. at 379-381. On appeal from the remand, this Court squarely held that the State's reliance on the Twenty-first Amendment to regulate the military's importation of liquor for the two concurrent jurisdiction bases rested on no stronger foundation than its ill-fated attempt to regulate out-of-state shipments to exclusive jurisdiction bases. *United States* v. *Mississippi Tax Comm'n*, 421 U.S.

599, 613-614 (1975) (*Mississippi Tax Comm'n II*). As the Court made clear:

> Nor does the Twenty-first Amendment require a different result. When the case was last here we held that "the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution]." 412 U.S., at 375; see *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938). Cf. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 140 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply * * *.

421 U.S. at 613 (brackets in original)).[27]

4. Taken together, this Court's decisions in *Mississippi Tax Comm'n I* and *Mississippi Tax Comm'n II*, when considered in light of settled doctrine that the Twenty-first Amendment has little force outside the Commerce Clause arena, establish that the Amendment does not confer authority on the States to regulate the federal government's procurement of alcoholic beverages. In this area, as in all others, the Supremacy Clause precludes state regulation of federal activities. *E.g.*, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. at 190; *Mayo* v. *United States*, 319 U.S. at 448; *Johnson* v. *Maryland*, 254 U.S. at 57. Here, as we have shown, North Dakota's regulations conflict with federal procurement law and with federal regulation of military enclaves and thus do not survive scrutiny under

[27] See also *United States* v. *Texas*, 695 F.2d 136, 139-141 (5th Cir.) (invalidating state regulation of military's procurement of alcoholic beverages), cert. denied, 464 U.S. 933 (1983); *United States* v. *South Carolina*, 578 F. Supp. 549, 553 (D.S.C. 1983) (same).

the Supremacy Clause. And, as this Court's decisions make clear, those regulations may not be resurrected under the Twenty-first Amendment.[28]

5. Confronted with this daunting line of precedent, appellants and their supporting amici seize upon the Court's statement in *Mississippi Tax Comm'n I*, 412 U.S. at 377—that a State may, "in the absence of conflicting federal regulation," regulate liquor shipments destined for military bases located within the State—as support for North Dakota's regulations. Appellants and amici have grasped a straw man.

First, the Court plainly stated that as a necessary (but not sufficient) condition, any state regulatory effort must not conflict with federal law. Here, as we have shown and

[28] Appellants suggest (Br. 20-24) that the Court should balance the State's interests in regulating the sale of alcoholic beverages with the federal government's interest in military procurement. That suggestion is inappropriate. To be sure, this Court has applied a balancing test in certain cases to determine the validity of state liquor laws enacted under authority of the Twenty-first Amendment that conflict with other constitutional provisions or federal law. But none of those cases has involved the federal government's immunity under the Supremacy Clause from state regulation of its affairs. Rather, each of those decisions involved a challenge to state liquor laws by *private parties* claiming the protection of federal law or overriding federal policy. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984) (conflict between Hawaii liquor tax provision and Commerce Clause resolved in favor of Commerce Clause); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminium, Inc.*, 445 U.S. 97 (1980) (conflict between State's wine minimum pricing system and the Sherman Act resolved in favor of federal interests reflected in the Sherman Act); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (conflict between New York State liquor regulation and Commerce Clause resolved in favor of Commerce Clause). See also *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987); *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

as the court of appeals correctly held, the State's regulations contravene applicable federal procurement law. See pp. 16-30, *supra*. Thus, North Dakota has not even satisfied the criteria for valid state liquor regulation suggested in *Mississippi Tax Comm'n I*.

Second, after stating that there was no need at that time to delineate the precise contours of the State's authority to regulate liquor passing through its territory, the Court in *Mississippi Tax Comm'n I*, 412 U.S. at 378, concluded that the State could not regulate direct transactions between the two exclusively federal enclaves in Mississippi and its out-of-state suppliers. And in *Mississippi Tax Comm'n II*, as discussed above, the Court made clear that its earlier holding was not grounded on rigid notions of territoriality. To the contrary, after noting its earlier conclusion that the Twenty-first Amendment "confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction * * *," the Court expressly held that "[w]e reach the same conclusion as to the concurrent jurisdiction bases * * *." *Mississippi Tax Comm'n II*, 421 U.S. at 613 (internal quotation marks and citations omitted)). Accordingly, the Twenty-first Amendment does not save North Dakota's regulations, which, in contravention of the Supremacy Clause, interfere with the federal government's procurement of liquor for bases located within the State.[29]

[29] The National Beer Wholesalers' Association, Inc. (Br. 22-24 & n.9) and the National Conference of State Legislatures, et al. (Br. 18), as amici curiae, seek to blunt the force of *Mississipp Tax Comm'n II* by suggesting that the decision "has only forbidden state taxation—and specifically, only where the state places the legal incidence of the tax on the United States or its instrumentalities" (National Beer Wholesalers' Association, Inc. Br. 22). That contention cannot be squared with the Court's express conclusion (421 U.S. at 613) that the Twenty-first Amendment does not empower the States to regulate the federal government's direct importation of liquor into federal enclaves, like military bases, where the government exercises exclusive or concurrent jurisdiction. Moreover, as we have shown (see pp. 31-34, *supra*), North Dakota, through its regulations, is effectively trying to "tax" the federal government (and favor in-state business interest in the process) by forcing it to change its procurement policy and purchase liquor from in-state suppliers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00347

REPLY

BRIEF

(10)

No. 88-926

In The

Supreme Court of the United States

October Term, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON, STATE TREASURER OF NORTH DAKOTA,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal From The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

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ARGUMENT

I. THE UNITED STATES' INTERPRETATION OF THE TWENTY-FIRST AMENDMENT UNDULY RESTRICTS THE STATE'S POWER TO REGULATE THE UNLAWFUL DIVERSION OF LIQUOR WITHIN ITS BORDERS AND MISREADS APPLICABLE TWENTY-FIRST AMENDMENT CASES.

In responding to North Dakota's twenty-first amendment arguments, the United States seizes on a few recent cases in which the Court has limited the states' power under the twenty-first amendment (U.S. Br. 35-38). The

United States, however, ignores one critical factor that distinguishes those cases from this case. In many of those cases, the Court expressly refused to find that the challenged state regulations were adopted to control liquor commerce and use within state borders. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Craig v. Boren*, 429 U.S. 190 (1976); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). The North Dakota regulations are readily distinguishable as they focus squarely upon the need to control liquor en route to federal enclaves and off the enclaves after delivery. The state's liquor regulations are an exercise of its "core power" under the twenty-first amendment, and prior case law has indicated that state law may even override federal concerns if necessary to uphold the exercise of this "core power." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

In contending that the twenty-first amendment provides no assistance to the state in defending the challenge to its regulations, the United States goes so far as to suggest that the states are without power to control the unlawful diversion of packaged liquor sold on base for off-base consumption (U.S. Br. 32). In effect, the United States argues that its constitutional immunity from state regulation extends to all authorized purchasers[1] who divert alcoholic beverages into the state's commerce in

[1] The clubs and package stores on the military installations purchase alcoholic beverages for resale to active and retired military personnel, their spouses and dependents, as well as other individuals authorized by the Department of Defense. J.S. App. at A-23.

violation of the state's ban on importation other than through its liquor distribution system, N.D. Admin. Code § 84-02-01-05(2).

Not only does this argument undermine the plain language of the twenty-first amendment, it ignores this Court's statement in *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 378 (1973), that "the State, of course, remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the two bases of liquor that has been purchased and is in fact 'destined for use, distribution, or consumption' within its borders."

The United States further argues that, if the state's liquor regulations are found to conflict with federal law, a balancing of the competing state and federal interests is not necessary (U.S. Br. 41 n.28). The United States contends, rather, that the federal government's exercise of its constitutional authority automatically prevails over the state's exercise of its twenty-first amendment power (U.S. Br. 40-42). According to the United States, a balancing test is appropriate only when a private party challenges a state's liquor regulation claiming the protection of federal law or overriding federal policy (U.S. Br. 41 n.28).

The United States' position represents an unduly restrictive view of this Court's "pragmatic effort to harmonize state and federal powers" when presented with conflicts between federal law and state liquor regulation. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980). When interpreting a state's twenty-first amendment powers under these circumstances, surely it should not matter whether a private

party or the United States is asserting the protection of federal law.

To the extent that the state regulations in question do not implicate interests at the core of the twenty-first amendment[2] and do conflict with federal policy, this Court should proceed to balance the competing federal and state interests to determine whether the state regulation must yield to federal policy. As established in the appellants' brief, the state's interests outweigh any competing federal interests (App. Br. 20-24).

Finally, the United States misreads *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), and *United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 613-14 (1975) (*Mississippi Tax Comm'n II*), in asserting that the state has no liquor regulatory power involving concurrent jurisdiction enclaves (U.S. Br. 38-40). In *Mississippi Tax Comm'n II* the Court carefully acknowledged that the state's concurrent jurisdiction over the bases had to be respected. The Court voided Mississippi's regulation because it required the out-of-state suppliers to charge the cost of the state mark-up to the military.[3] The United States fails to acknowledge this essential element of the *Mississippi Tax Comm'n II* decision. The North Dakota regulations in no way require suppliers to increase their prices or charge any

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[2] The state contends that its regulations are an exercise of its core power reserved by the twenty-first amendment and should prevail regardless of whether they conflict with federal policy (App. Br. 12-14).

[3] In fact, the issue as stated by the Court was "whether [the state regulation in question] imposes an unconstitutional state tax upon these federal instrumentalities." 421 U.S. at 601.

particular cost to the military. The United States' argument, thus, represents an unwarranted extension of the Court's decisions in *Collins* and *Mississippi Tax Comm'n II* and would, in effect, establish a constitutional immunity of the United States so broad that the state would be deprived of any authority whatsoever to control shipments of liquor destined for concurrent jurisdiction federal enclaves located within its borders or off the enclaves after delivery. *Collins* and *Mississippi Tax Comm'n II* do not support the broad constitutional immunity the United States asserts.

II. NORTH DAKOTA'S REGULATIONS EXERCISING ITS TWENTY-FIRST AMENDMENT POWERS NEITHER VIOLATE A CONSTITUTIONAL IMMUNITY OF THE UNITED STATES NOR CONFLICT WITH FEDERAL LAW.

The United States urges that North Dakota's regulations, as applied to prime source suppliers of liquor to the NFIs, violate a constitutional immunity of the United States and also impermissibly conflict with federal legislation regulating purchases of liquor by the military. The United States' argument is not supported by the federal statute or the decisions of this Court.

A. The United States' Argument That North Dakota's Regulations Violate a Constitutional Immunity of the Federal Government Has No Merit Because the Regulations are Applied to Prime Source Suppliers and do not Regulate Directly a Federal Governmental Function.

The United States cites three general procurement cases[4] in support of its contention that North Dakota's attempt to regulate suppliers of liquor to the military falls within a constitutional immunity (U.S. Br. 26-29). However, the Court decided each of these cases on the basis that a state's policy of regulated prices impermissibly and directly conflicted with federal law mandating competitive procurement. As stated by the Court in *Paul v. United States*, 371 U.S. 245 (1963), "the collision between the federal policy of negotiated prices and the state policy of regulated prices is . . . clear and acute" and, under those circumstances, the state policy must give way under the supremacy clause. *Id.* at 253. As the appellants have already established (App. Br. 14-20), the present case does not present such a "clear and acute" collision between the state's regulations and federal law.

The other cases cited by the United States in support of its constitutional immunity argument[5] involve attempts by states to regulate directly a federal governmental function. Here, the state is not attempting to regu-

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[4] *Paul v. United States*, 371 U.S. 245 (1963); *United States v. Georgia Public Service Comm'n*, 371 U.S. 285 (1963); *Public Utilities Comm'n of California v. United States*, 355 U.S. 534 (1958).

[5] *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956); *Mayo v. United States*, 319 U.S. 441 (1943); *Johnson v. Maryland*, 254 U.S. 51 (1920); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

late directly the activities of the federal government but, rather, the state imposes its regulations on the suppliers. The United States' contention that the state's regulation of suppliers violates the federal government's constitutional immunity disregards the teachings of this Court in *Washington v. United States*, 460 U.S. 536 (1983), and *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943).

In *Washington v. United States* this Court upheld a tax imposed only on federal contractors against a challenge by the United States that such a tax violated its constitutional immunity. Because the tax imposed on the federal contractors was actually less than the tax applied to private contractors, and therefore was not discriminatory, the Court upheld the state tax. 460 U.S. at 540-42.

The Court in *Penn Dairies* similarly held that state regulation of government suppliers does not violate a constitutional immunity of the United States. 318 U.S. at 268-71. The United States contends that *Penn Dairies* is distinguishable from the present case because it involved a federal regulation implementing a "hands off policy" with respect to state minimum price laws (U.S. Br. 32 n.21). However, the regulation implementing the "hands off policy" played no role in the Court's determination in *Penn Dairies* that state regulation of government suppliers does not violate a constitutional immunity of the federal government.

The Court in *Penn Dairies* further held that the state's minimum price regulation did not conflict with the federal statute that required competitive bidding "except in case of emergency or where it is impractical to secure competition." 318 U.S. at 272-75. The "hands off policy"

regulation was not relevant to this conclusion and was discussed only in response to the United States' assertion that, independent of the federal statute, the federal regulatory scheme preempted state law.[6]

B. The United States Misreads the Plain Language of the Liquor Procurement Statute and Unduly Relies on the Prime Source Suppliers' Responses to the State's Regulations in Arguing That the Regulations Impermissibly Conflict With Federal Law.

The United States contends that the procurement statute in question, 10 U.S.C. § 2488 (Supp. V 1987), requires the military to purchase alcoholic beverages at the "lowest cost" (U.S. Br. 17). The United States provides an extended review of the legislative history of the military's liquor procurement statute (10 U.S.C. § 2488) to support its argument that Congress intended to elevate the price factor above all other concerns (U.S. Br. 17-23).[7]

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[6] In finding that the federal regulations did not preempt state law, the Court questioned the authority of the Secretary of War "to do what Congress has failed to do – restrict the application of local regulations, otherwise applicable to government contractors, which increase price." *Penn Dairies*, 318 U.S. at 276.

[7] The United States' suggestion that Congress' intent in passing 10 U.S.C. § 2488(a)(1) was to reinstitute a longstanding military procurement policy of purchasing alcoholic beverages from out-of-state prime source suppliers is not supported by the record in this case. In fact, the federal enclaves located in North Dakota purchased their alcoholic beverages from local North Dakota wholesalers until approximately June 1985.

Resort to legislative history is unnecessary here, however, given the unambiguous language of the statute.

The plain language of the statute and the federal regulation does not mandate the purchase of alcoholic beverages at some absolute low price but, rather, requires only that the United States utilize a procurement scheme that obtains the most "competitive" or "advantageous" price available (App. Br. 16).[8] After its extensive discussion claiming that Congress intended price to be the controlling factor in liquor procurement, the United States later concedes that price is not the sole determinant in the military's competitive procurement process (U.S. Br. 22).

In arguing that North Dakota's regulations conflict with federal policy, the United States stresses that five out-of-state suppliers informed the military that they will no longer ship to the NFIs located in North Dakota and that one supplier indicates it will increase its prices on North Dakota sales by as much as $20.50 per case.[9] The

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[8] As established in the appellants' brief, the state's regulations do not prevent the military from procuring its liquor at the most "competitive" or "advantageous" price available (App. Br. 14-20).

[9] The United States apparently made no attempt to find alternative sources from outside the state when faced with its suppliers' response. Instead, it seized on the response of its first-choice suppliers to conclude that no other out-of-state suppliers exist. In addition, the government conveniently utilizes the 200 ml. container case (48 bottles) price increase ($20.50) and ignores the fact that the price increases were much less for the 1.75 ltr. (6 bottles) case ($.85), 1 ltr. (12 bottles) case

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prime source suppliers' responses to the state's regulations are beyond the state's control. As long as the state's regulations are not a pretext to discriminate against federal contractors, the suppliers' independent decisions should not control whether the state's regulations impermissibly conflict with federal policy.

North Dakota's regulations do not violate a constitutional immunity of the United States nor do they impermissibly conflict with the federal procurement law.

III. NORTH DAKOTA'S REGULATIONS ARE NOT A PRETEXT TO FORCE THE MILITARY TO PURCHASE ALCOHOLIC BEVERAGES FROM IN-STATE WHOLESALERS AND INCREASE LIQUOR TAX REVENUE.

For the first time in this litigation, the United States asserts in its brief that North Dakota adopted the regulations in question as a pretext to force the military to purchase its alcoholic beverages from in-state wholesalers and, therefore, increase the state's liquor tax revenue (U.S. Br. 33-34, 35 n.23, 42 n.29).[10] The basis of the United States' pretext claim is that the North Dakota regulations are applied only to prime source suppliers and not to

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($2.95), 750 ml. (12 bottles) case ($3.75), and 375 ml. (24 bottles) case ($9.58). J.A. 19. In fact, the price increase for the 1.75 ltr. container case was less than one percent.

[10] The United States concludes that the state's labeling and reporting requirements are "so onerous as to cause [the prime source suppliers] to stop dealing with the military entirely, or to raise their prices on military sales" (U.S. Br. 30).

North Dakota beer and liquor wholesalers that sell alcoholic beverages to the military (U.S. Br. 34). The fact that North Dakota does not impose the regulations in question on North Dakota wholesalers that sell alcoholic beverages to NFIs does not demonstrate that the regulations are a pretext.

The licensed North Dakota wholesalers (beer and liquor) are subject to a far more intricate and burdensome regulatory scheme than the prime source suppliers. Reports concerning shipments of liquor and beer from prime source suppliers to North Dakota wholesalers must be filed by both the supplier and the wholesaler. N.D. Admin. Code §§ 84-02-01-05(3), 84-02-01-07. The state's wholesalers are subject to licensure, reporting, and bonding requirements and must pay a business privilege tax. N.D.C.C. ch. 5-03; N.D. Admin. Code ch. 84-02-01. The State Treasurer may examine the books and premises of a wholesaler at any time to determine compliance with state statutes and regulations. N.D.C.C. § 5-03-06. Because the alcoholic beverages shipped to North Dakota wholesalers have passed through the state's established liquor distribution system, North Dakota receives information about the liquor's availability and collects the appropriate taxes. By contrast, liquor sold directly to the military bases from prime source suppliers does not pass through the state's established liquor distribution system; so, North Dakota has taken the only practical alternative available – requiring labeling and reporting by out-of-state suppliers – to insure an adequate base of knowledge and to prevent diversion of the liquor into the state's commerce.

Because the liquor destined for military enclaves is subject to far less regulation than alcoholic beverages passing through the state's established liquor distribution system, it cannot be said that the North Dakota regulations discriminate against prime source suppliers or operate as a pretext to force in-state purchases and increase liquor tax revenue.

In addition, at the time the regulations were promulgated, the State Treasurer could not have anticipated that the minimal cost of the labels (3¢ – 5¢ per label) would cause the prime source suppliers not to deal directly with the NFIs. Rather, it was reasonable for the State Treasurer to assume that the economic burden of complying with the regulations would either be absorbed by the suppliers or allocated among the parties in light of the anticipated large volume of direct procurement.

The United States also subtly implies that the state's anti-diversion regulation was promulgated only after amendments supported by Senator Andrews and Congressman Dorgan of North Dakota failed in Congress (U.S. Br. 20 & n.14, 22). These amendments would have required the military enclaves to purchase all alcoholic beverages from in-state suppliers. However, the state's anti-diversion regulations were already in effect at the time that these amendments were proposed in Congress.[11] If anything, the actions of Senator Andrews and

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[11] The labeling requirement became effective January 1, 1986, whereas the reporting requirement has existed since July 1, 1978. J.A. 29-30. Senator Andrews proposed his amendment on the Senate floor on August 9, 1986. 132 Cong. Rec. 20,219

(Continued on following page)

Congressman Dorgan suggest that they believed North Dakota's anti-diversion regulations would not cause the military to purchase from in-state suppliers and that the proposed amendments were necessary to accomplish the objective of requiring in-state purchases of distilled spirits by the military.

In making its argument that the state's regulations are pretextual, the United States rejects the findings of both the district court and the Eighth Circuit that North Dakota did not adopt the regulations as a pretext to force the military to buy from North Dakota wholesalers. J.S. App. at A-15, A-31. This Court should reject the United States' claim that the regulations are pretextual.

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(1986). Representative Robinson of Arkansas proposed his amendment and Congressman Dorgan supported that amendment on the House floor on August 13, 1986. 132 Cong. Rec. 21,225 (1986).

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Dated this 8 day of August, 1989.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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BRIEF OF THE NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION AND NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

What is the extent to which North Dakota can regulate, under the Twenty-First Amendment, out-of-state suppliers of alcoholic beverages destined for concurrent jurisdiction military installations in North Dakota in order to prevent diversion of those alcoholic beverages into commerce within the state?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF OF THE NATIONAL ALCOHOLIC BEVERAGE CONTROL ASSOCIATION AND NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

This brief is submitted with the written consent of all parties on file with the Clerk of this Court.

The National Alcoholic Beverage Control Associaiton (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* supporting the position of Appellants and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the

Eighth Circuit in *United States v. North Dakota*, 856 F.2d 1107 (8th Cir. 1988).

INTEREST OF THE *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the 18 states (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) which directly control the distribution and sale of alcoholic beverages under the Twenty-First Amendment through government-operated wholesale and/or retail establishments. In addition to the enumerated states, Montgomery County, Maryland, is a member of the NABCA, and the North Carolina Association of ABC Boards is a Participating Member.

NABCA member jurisdictions not only operate wholesale and retail establishments, but they also perform licensing and regulatory functions with regard to private alcoholic beverage distribution channels within their jurisdiction. For example, the State of Iowa acts as the only wholesaler of distilled spirits within that state; the state sells distilled spirits to non-governmental retailers who must obtain licenses from the state and who must operate in accordance with rules and regulations promulgated by the state.

NCSLA is an unincorporated organization which represents the remaining 32 state, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing and regulatory capacity, having chosen, pursuant to the Twenty-First Amendment, to permit the distribution of alcoholic beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because this case involves the extent to which a state has the authority to control the unlawful and unregulated distribution (i.e., diversion) of alcoholic beverages within its borders, the *amici* have a great interest in the outcome of this matter.

STATEMENT OF THE CASE

Because of the American experience with Prohibition and the subsequent adoption of the Twenty-First Amendment to the Constitution, alcoholic beverages constitute one of the most highly regulated lawful commodities available in commerce. For example, North Dakota is one of five states which totally prohibit all personal importation of alcoholic beverages.[1]

Military installations located in North Dakota are federal enclaves and thus not part of the state (even though the bases are "concurrent jurisdiction" establishments); thus the "no importation" rule is equally applicable to alcoholic beverages brought into the state from a military establishment within North Dakota as it is to alcoholic beverages brought in from a neighboring state.

Since package stores on military bases located within North Dakota's borders represent a potential source for illegally diverted alcoholic beverages in contravention of state law, the state, acting through its duly authorized official, State Treasurer Robert E. Hanson, adopted regulations requiring out-of-state suppliers to report all shipments to so-called Non-Appropriated Fund Instrumentalities located on military bases in North Dakota[2] and to place a label on each container of alcoholic baverages delivered to those bases indicating that the products is designed for consumption only on those military bases.[3]

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[1] N.Dak. Admin. Code § 84-02-01-05(2) (1986).

[2] *Id.* § 84-02-01-05(1).

[3] *Id.* § 84-02-01-05(7).

The United States challenged the regulations as being in conflict with a federal law requiring the military to purchase distilled spirits from the "most competitive source, price and other factors considered" [4], arguing that the regulations caused an increase in prices charged by out-of-state suppliers to cover the additional costs incurred in affixing the required labels.

The regulation was upheld by the District Court, *United States v. North Dakota*, 675 F. Supp. 555 (D.N.D. 1987), but that decision was reversed by the Eighth Circuit. *United States v. North Dakota*, 856 F.2d 1107 (8th Cir. 1988). This Court has noted probable jurisdiction on North Dakota's appeal. *North Dakota v. United States*, 109 S.Ct. 1567 (1989).

SUMMARY OF ARGUMENT

The State of North Dakota, in enacting the regulation at issue in this case, is merely exercising its long-recognized right to regulate the transportation of alcoholic beverages through its territory in the interest of preventing unlawful diversion of those products into the state's stream of commerce in violation of the pattern of alcoholic beverage distribution and sale it has chosen to adopt pursuant to the Twenty-First Amendment.

Although this authority to regulate transportation of alcoholic beverages is not without its limitations, this case, unlike others in which this Court has ruled, does not involve a direct regulation of sales to the military or other instrumentalities of the federal government, and thus should not be judged by those standards.

Finally, North Dakota's regulation, even when measured against the federal law which prescribes standards for military procurement of alcoholic beverages, survives traditional pre-emption tests because it does not conflict

[4] 10 U.S.C. § 2488(a)(1).

with the federal law and because it is a "core" power regulation under the Twenty-First Amendment.

ARGUMENT

North Dakota Has the Unquestioned Right to Regulate the Transportation of Alcoholic Beverages Through Its Territory in the Interest of Prevening Unlawful Diversion.

In adopting the regulation at question in this case, North Dakota was acting to prevent the unlawful diversion of alcoholic beverages into its stream of commerce. Whether viewed within the confines of the Commerce Clause or pursuant to the Twenty-First Amendment, North Dakota's action must be allowed to stand.

The Commerce Clause grants to the Congress the authority to regulate the transportation and distribution of products and services moving among the states, between the states and federal enclaves, and between the states and foreign countries. But while this authority may generally be viewed as proscribing most state regulation of interstate commerce, this Court has long recognized the right of a local authority to regulate such interstate commerce in the absence of Congressional action and where necessary to protect the state from injuries arising from such commerce. *Carter v. Virginia*, 321 U.S. 131 (1944), at 135.

The regulation at issue in this case presents just such a circumstance, one in which this Court has, on several occasions, recognized the right of the state to act.

In *Duckworth v. Arkansas*, 314 U.S. 390 (1941), for example, this Court upheld the right of a state to require that companies transporting liquor through the state obtain a permit from the State Commissioner of Revenue, so that the state might know who was using the state's highways and might monitor such use to determine that

no unlawfully-manufactured or imported alcoholic beverages found their way into the state. In short, the state wanted to be sure that the product which was alleged to be transported through the state was so transported.

A more comprehensive regulatory scheme was upheld by this Court in *Carter*. There, a state sought to require that shippers of alcoholic beverages must follow the most direct route through the state, must file a bill of lading showing that route and the name of the true consignee of the product being shipped (a consignee who must have a legal right to receive the shipment), and post a $1,000 bond to assure compliance with the regulation. Again, the regulation was an effort by the state to assure that alcoholic beverages which were said to be moving through the state did just that, and were not illegally diverted into the state's internal stream of commerce in contravention of its rules and regulations.

On some occasions, however, a state has gone too far and has not adopted a regulatory or control measure but rather has sought to totally prohibit or prevent the transportation of alcoholic beverages through its territory. In those situations, this Court has stepped in to strike down the state measure, but, while so doing, has continued to recognize the ability of a state to control the transportation of alcoholic beverages in the interest of preventing unlawful diversion. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1963), at 333.

Even where a state has attempted to directly tax military procurement, this Court has noted that a state may properly exercise its police powers to regulate and control the shipment of alcoholic beverages during their passage through its territory insofar as necessary to prevent unlawful diversion. *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973), at 377.

While these cases have generally relied on analyses of the Commerce Clause, it has also been strongly suggested

that the outcome would be no different if the basis for the decision were the Twenty-First Amendment.[5]

Thus, it is clear that North Dakota has acted well within recognized authority in adopting the regulation at question in this case. Indeed, the North Dakota regulation is far less onerous on the shipper of alcoholic beverages that some which have been sustained by this Court.

Although the Right to Regulate Alcoholic Beverages Is Not Without Its Limitations, This Case Does Not Involve a Direct Regulation of Sales to the Military.

While it is clear that North Dakota, like other states, has the right to regulate the transportation of alcoholic beverages through and into its territory, as well as to regulate other aspects of the distribution of this highly-regulated product, it is also without question that such authority is not limitless.

A long line of opinions from this Court, including several relied upon by the United States, would indicate that this authority is limited to regulation of non-governmental entities, and, indeed, the North Dakota regulation at issue here is not directed at the United States government or any of its officers or agencies, but rather to those non-governmental entities which supply the federal government. This court has recognized that those who contract to furnish supplies—as here—or to render services to the government are not in themselves governmental agencies and do not perform governmental functions which would place them beyond the reach of state regulation. *Penn. Dairies, Inc. v. Milk Control Commission of Pennsylvania*, 318 U.S. 261 (1943).

Nor can it be said that North Dakota's regulation of non-governmental entities acts to thwart the will of

[5] See Mr. Justice Jackson's concurring opinion in *Duckworth* (supra) and concurrences of Mr. Justice Frankfurter and Mr. Justice Jackson in *Carter* (supra).

Congress as evidenced in the federal procurement statute which mandates competition in the supply of alcoholic beverages to the military. *Paul v. United States*, 371 U.S. 245 (1963). The regulation at issue, while it mandates action on the part of out-of-state wholesalers of alcoholic beverages, leaves the military free to pursue its Congressionally-mandated, competitive procurement policy while permitting North Dakota to enact a reasonable regulation designed to minimize the possibility of illegal diversion of alcoholic beverages.

North Dakota is not attempting to impose its "no-diversion" policy directly on the military, or to mandate an across-the-board action by way of pricing which could be construed as an attempt to tax, or to directly impose state regulatory policy on the military. North Dakota was no doubt well aware of the strictures laid down by the courts as to the impermissability of state taxation or similar regulation of sales to, or purchases by the military. *See, e.g., United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973), *United States v. State Tax Commission of Mississippi*, 421 U.S. 599 (1975), *United States v. State of South Carolina*, 578 F.Supp. 549 (D.S.C. 1983).

Again, the State of North Dakota is not attempting to impose its regulations directly upon the military. However, to suggest that the added cost which attends the imposition of this regulation—just as added cost attends the imposition of virtually every federal and state regulation of private enterprise—acts somehow to be the equivalent of a tax or price-fixing scheme which limits competition in military procurement is to indicate that the principles of state regulation of alcoholic beverage have absolutely no continued viability when they impact, however slightly, the operations of the federal government or its agencies and instrumentalities.

This type of lawful, non-governmental regulation, designed to achieve a long-recognized purpose, must be allowed to stand.

The North Dakota Regulation Is Not Pre-Empted by Federal Procurement Law Because It Does Not Directly Conflict with Such Law.

Notwithstanding North Dakota's ability to regulate transportation of alcoholic beverages through its territory, and its ability to impose those regulations on non-governmental entities, any attempt to so regulate must fall if it conflicts with the operation of federal law in such a way that both cannot stand. The typical pre-emption inquiry, as this Court is well aware, involves a determination of whether there exists an irreconcilable conflict between the federal and state regulatory schemes under consideration. *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

It is submitted, however, that no such irreconcilable conflict exists and that, under standards established by the courts, the North Dakota regulation can continue to exist side-by-side with the operation of federal procurement law.

Before undertaking this analysis, it is first important to carefully note the provisions of the federal law which the United States seeks to utilize to strike down the regulation at issue. In enacting 10 U.S.C. § 2488, Congress sought not to mandate that the military procure distilled spirits at the lowest product price available; rather, the explicit direction in the statute is that the procurement be from the "*most competitive source*, price and *other factors* considered" (emphasis added). Indeed, if the Congress had wanted the military to be free of considerations other than price, it could have simply mandated that the product be purchased from the supplier which offered the lowest price. However, because the product involved was alcoholic beverages—a product which is

among the most highly regulated products moving in commerce—the Congress obviously wanted the military to consider factors other than price when making a choice of suppliers. Those factors could involve commercial considerations, such as minimum purchase requirements or delivery schedules, or they could involve consideration of cooperation with state and local alcoholic beverage regulatory officials; Congress chose to leave those considerations to the military to determine, so long as the "end result" was a supplier which, in the military's judgment, constituted the "most competitive source" for the alcoholic beverages being purchased.

As has been pointed out earlier in this case, there is no conflict between this federal statute and North Dakota's regulatory scheme. The regulation may have increased the price that the military would have to pay to *some* suppliers of its alcoholic beverages, those located outside of North Dakota, but they do not frustrate the federal statute, since it mandates only that a relative term—"most competitive source"—and not an absolute term—the "lowest price bidder", for example—be observed. *United States v. State of North Dakota*, 675 F.Supp. 555 (D.N.D. 1987).

Beyond irreconcilable conflict, however, one may also look to whether the state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Again, it is submitted that the regulation at issue does not frustrate the objectives of Congress, for if it were so construed, the end result would be the preemption of *any* state regulation which caused *any* increase in price of *any* amount to the military; that conclusion would thus serve to undermine *all* state regulation of alcoholic beverages, since such regulation could be deemed to have a tangential impact on the military.

It is clear that state regulatory schemes which merely impose upon federal activity, without vitiating its impact

or intent, can be valid exercises of state authority. *United States v. State of Texas*, 695 F.2d 136 (5th Cir. 1983), at footnote 6. While it can be said that the North Dakota does, in fact, impose on the military's compliance with the federal procurement statute, by raising some of the prices that the military will have to pay to some of its suppliers, it does not thereby stand to reason that such an imposition impacts the federal statute in such a way that the two cannot co-exist.

CONCLUSION

For the reasons set forth herein, the judgment of the United States Court of Appeals for the Eighth Circuit should be overturned.

Respectfully submitted,

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May 25, 1989

AMICUS CURIAE

BRIEF

No. 88-926

In The

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON,
STATE TREASURER OF NORTH DAKOTA,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE FOR NATIONAL BEER WHOLESALERS' ASSOCIATION, INC. IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether North Dakota's liquor labelling and reporting regulations, narrowly designed to track the shipment of out-of-state liquor into concurrent jurisdiction federal installations and to prevent diversion into the state, are protected by Section 2 of the Twenty-First Amendment from preemption by federal procurement law?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

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INTERESTS OF THE AMICUS

This brief is submitted on behalf of the National Beer Wholesalers' Association, Inc. ("NBWA"), as *amicus curiae*, in support of Appellant, the State of North Dakota.[1] The NBWA is a trade association representing the

[1] Consent to the filing of this brief from counsel for both parties has been filed with the Clerk of this Court.

interests of 1,800 beer wholesalers and distributors nationwide. Because the distribution of beer and other alcoholic beverages is subject to pervasive state regulation under the Twenty-First Amendment, the NBWA and its members have a strong interest in ensuring the correct interpretation of federal and state authority in this area. The NBWA has presented amicus arguments in other recent Twenty-First Amendment cases before this Court, including ones involving the proper delineation of authority over alcoholic beverages between the states and the federal government.

STATEMENT

As part of its comprehensive state scheme regulating the sale and consumption of liquor within its borders, North Dakota prohibits the importation of liquor – even that intended solely for personal use – by any person who does not hold a state license.[2] Package stores on

[2] Liquor entering North Dakota may be shipped "only to licensed wholesalers." N. Dak. Admin. Code § 84-02-01-05(2)(1986). The North Dakota "no personal importation" regulation is similar to measures enacted by many other states, since almost every state limits or prohibits the amount of liquor that may be brought into it for personal use. Five states ban all personal importation. Seven states allow importation for personal use only if a state fee or tax is paid. Another five states allow importation of small amounts for personal use but only if brought into the state from outside the U.S. The remaining states allow importation of small amounts, typically one gallon or less, for personal use. *See* Appendix B to NBWA's *Amicus Curiae* Brief in Support of North Dakota's Jurisdictional Statement, *North Dakota v. United States*, No. 88-926 (brief filed Dec. 21, 1988).

military bases within North Dakota create the potential for illegal diversion of liquor into the state in violation of its laws limiting or prohibiting importation for personal use.[3]

In an attempt to prevent the diversion of unregulated liquor into state commerce from military bases, North Dakota has adopted two regulations applicable to out-of-state suppliers of liquor to Non-Appropriated Fund Instrumentalities ("NFIs") at military bases in North Dakota. (NFIs include both clubs, where liquor is sold for consumption on the premises, and package stores, where liquor is sold for consumption off the store premises.) These regulations require the out-of-state suppliers to report to the state treasurer all shipments to NFIs on North Dakota bases[4] and to affix a label to each bottle of liquor delivered to North Dakota bases indicating that the liquor is for consumption only on military bases.[5]

The United States challenges these regulations as an impermissible burden on federal contractors – the out-of-state suppliers to NFIs on bases in North Dakota. The District Court upheld the regulation. *United States v. North Dakota*, 675 F. Supp. 555 (D.N.D. 1987). The Eighth Circuit reversed. *United States v. North Dakota*, 856 F.2d 1107 (8th Cir. 1988). North Dakota brought this appeal seeking to affirm its power to regulate liquor traffic

[3] *See* Affidavit of North Dakota State Treasurer Robert Hanson ¶¶ 8 & 10, J.A. at 35-36.

[4] N. Dak. Admin. Code § 84-02-01-05(1)(1986).

[5] *Id.* § 84-02-01-05(7).

within its borders. This Court noted probable jurisdiction. *North Dakota v. United States*, 109 S.Ct. 1567 (1989).

SUMMARY OF ARGUMENT

1. The challenged North Dakota regulations, which impose reporting and labelling requirements on out-of-state suppliers of liquor to military bases in North Dakota, are a narrow and justifiable exercise by a state of "the core Section 2 power" of the Twenty-First Amendment to regulate the sale or use of liquor within state borders. Contrary to the government's assertion, the regulations are not preempted by federal procurement law or regulations; indeed, federal procurement regulations recognize states' concerns in preventing diversion of unregulated liquor within their borders. North Dakota's regulations impose no tax on government purchasers. Nor do they otherwise infringe upon the procurement authority of the United States. The minimal burden they place on out-of-state suppliers of liquor does not create a conflict because they do not directly burden the government entities as ultimate purchasers.

2. Indeed, the regulations do nothing more than the Twenty-First Amendment emphatically and expressly intended – allow a state to choose how and when liquor will be distributed within its borders. The express language of Section 2 of the Twenty-First Amendment contains a broad grant of power to the states to regulate liquor traffic and commerce within their borders. The intent to provide the states with broad discretion is

confirmed by numerous statements by the framers of the Amendment.

Under the facts presented here, there is no basis for restricting North Dakota's Section 2 authority. The regulations are fully in accord with prior decisions of this Court recognizing the power of the states, under the Twenty-First Amendment, to control liquor delivered within the state, including delivery to concurrent jurisdiction federal enclaves. In order to ensure that military bases do not become the back door through which unregulated liquor flows into the state in violation of North Dakota law, the regulations should be upheld.

ARGUMENT

I.

Preemption Is Not Applicable Here Because No Conflict Exists Between North Dakota's Regulation Of Liquor Suppliers And The Federal Procurement Statute.

Under traditional preemption analysis, the Court must consider whether a particular state action is in conflict with a federal statute. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-99 (1984). In the absence of a conflict, no preemption will be found. Here, the federal government asserts that because the state regulations purportedly increase the costs charged to NFIs, they necessarily infringe on the procurement requirement that liquor be obtained "from the most competitive source, price and other factors considered,. . . ." 10 U.S.C. § 2488(a)(1) (Supp. IV 1986). North Dakota's regulations

requiring labels and reports on out-of-state liquor are a narrowly focused effort to halt the flow of unregulated liquor into state commerce and do not mandate any price increase. Thus, they are not in conflict with the federal procurement requirement.

A. Applying Traditional Preemption Analysis, Federal Procurement Law Does Not Preempt the North Dakota Labelling and Reporting Regulations.

Federal preemption is found in three situations: (1) where the federal law expressly overrides state law, (2) where Congress has adopted a comprehensive legislative scheme which so occupies the field that it leaves no room for supplementary state regulation, and (3) where there is either an actual conflict between federal and state law or the state law stands as an obstacle to the accomplishment and execution of the full objectives and purposes of Congress. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 699. Because none of these situations is present here, North Dakota's labelling and reporting requirements are not preempted by federal law.

First, the federal procurement law and regulations do not expressly preempt state liquor regulations.[6] There is no suggestion anywhere in the federal procurement law that Congress intended to permit NFIs to import liquor into states without regard to possible effects on a state's ability to control the distribution of liquor within its

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[6] Indeed, statutory and regulatory language suggests that such state regulations are to be considered "other factors." *See infra* section I.B.

borders. Second, this is not a case where federal action has so occupied the field so as to preclude state regulation. The federal liquor procurement law does not establish an overwhelming need for nationwide uniformity, and such uniformity is unlikely since the regulations and the statute clearly state that "other factors" must be considered when making purchasing decisions. Third, there is no actual conflict between the North Dakota regulations and the federal regulations because out-of-state suppliers can comply with both. *Compare Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-48 (1963). Nor do North Dakota's regulations stand as an obstacle to Congress' objectives and purposes in the NFI liquor procurement scheme, since Congress's objectives and purposes do not require that the purchase of liquor be based solely on cost.[7] State efforts to track out-of-state liquor in

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[7] The argument of the United States that the federal liquor procurement statute and regulations require cost to be the only factor erroneously relies on the similarity of language in that statute and regulations, 10 U.S.C. § 2488(a)(1) and DoD Regulation 1015.3-R, ch. 4, ¶ C, and the statutory and regulatory language examined in *Paul v. United States*, 371 U.S. 245, 251 (1963). While, it is true that the statutory language at issue in *Paul* closely approximates the statutory language of 10 U.S.C. § 2488(a)(1), this case is readily distinguishable.

In both *Paul* and *Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943), the case relied on by North Dakota, the possibility of a direct clash between federal and state law existed because the state law prevented all potential federal suppliers from bidding at a price below the state minimum price. *See Paul*, 371 U.S. at 253 ("The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States *by having a state officer fix the*

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order to prevent diversion are in fact recognized as consistent with federal procurement law.[8] The absence of any conflict is demonstrated by a careful examination of the commands of the federal statute and the manner in which the North Dakota regulations operate.

B. Federal Procurement Law Does Not Require that Cost be the Only Factor Considered by NFIs In Purchasing Liquor.

The federal procurement statute, 10 U.S.C. § 2488(a)(1) (Supp. IV 1986), requires that liquor purchases be made from "the most competitive source, price and other factors considered,. . . ." The implementing regulations similarly require that NFIs purchase liquor so as to "obtain for the government the most advantageous contract, price and other considered factors." 32 C.F.R. § 261.4 (1987)(quoting DoD Reg. 1015.3-R, ch. 4, ¶ C (1982)[9]). Both the statute and regulations expressly state that price is not the sole factor to be considered in making

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price . . . ." (emphasis added)). Given the clear price commands of state law, the Court in *Penn Dairies* and *Paul* had to decide whether the federal procurement law would permit the states to establish a floor for the prices used in bids for federal contracts. By contrast, North Dakota's regulations do not set a lower limit on the prices that the out-of-state suppliers can use as the basis for their bids.

[8] *See infra* note 10 and accompanying text.

[9] The DoD Regulations were initially adopted pursuant to the authority of the Secretary of Defense to prescribe regulations governing liquor sales on military posts. 50 U.S.C. app. § 473 (1982 & Supp. IV 1986).

purchasing decisions. Reasonable efforts to prevent unlawful diversion are appropriately considered among the "other factors." The DoD regulations governing NFI liquor purchases specifically recognize state concerns about unlawful diversion and support state efforts to prevent such diversion: "Members of the Uniformed Services and other authorized purchasers shall not sell, exchange, or otherwise divert packaged alcoholic beverages . . . for purposes which violate . . . state, or local laws. . . ." DoD Reg. 1015.3-R, ch. 4, ¶ F3 (1982).[10]

C. The Minimal Burden that the North Dakota Regulations Place on Out-of-State Suppliers of NFIs Does Not Create a Conflict Because the Regulations Do Not Directly Burden NFIs as the Ultimate Purchasers.

North Dakota's regulations are not an instance of impermissible discrimination against out-of-state interests. The regulatory burden imposed on out-of-state suppliers to NFIs is much less than the burden imposed on in-state suppliers to NFIs.[11] Any liquor that NFIs buy

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[10] Other federal statutes applicable to the military also recognize the states' legitimate interest in controlling distribution and consumption of alcoholic beverages. *E.g.*, 10 U.S.C. § 2683 (Supp. IV 1986) (requiring minimum age limits for purchase of alcoholic beverages on military posts to conform, with few exceptions, to minimum age limits of surrounding state).

[11] Indeed, the out-of-state suppliers to NFIs face the smallest regulatory burden compared to that imposed on in-state suppliers to NFIs and out-of-state or in-state suppliers to individual consumers. The in-state suppliers to NFIs are

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from in-state wholesalers is not subject to the labelling or reporting regulations because that liquor has already complied with North Dakota's more stringent regulatory regime applicable to in-state liquor supplies. The fact that one form of state regulation is imposed solely on federal suppliers does not amount to invalid discrimination when the state regulatory burden imposed on the federal suppliers complements a different form of regulatory burden already imposed on nonfederal suppliers. *Washington v. United States*, 460 U.S. 536, 541-46 (1983). This is particularly true when the problem arises only in the case of federal contractors, and the Twenty-First Amendment is applicable.

North Dakota's regulatory requirements impose, at most, a minimal burden on out-of-state suppliers. The reporting requirement is nothing more than a notification provision of a type common to many forms of business activity. The labelling requirement is similarly nonintrusive. The labels need not be purchased from the State of North Dakota but may be obtained from any printer or

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the licensed North Dakota wholesalers, which are already subject to detailed state regulation. There are no in-state distillers in North Dakota, so North Dakota's regulation cannot be attacked as a form of protectionism for in-state producers of liquor who might want to sell to NFIs. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 125 (1978). Out-of-state suppliers/distillers cannot sell their product directly to individual consumers in North Dakota, but instead must sell their products to a licensed North Dakota wholesaler. N. Dak. Admin. Code § 84-02-01-05(2).

may be printed by the suppliers themselves.[12] The United States incorrectly assumes that the regulations impose a direct cost on NFIs' out-of-state suppliers.[13]

Any price increases to NFIs would only result from independent decisions by the suppliers to pass along the costs of the state regulation.[14] Each out-of-state supplier

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[12] Affidavit of North Dakota State Treasurer Robert Hanson ¶ 7, J.A. at 34-35.

[13] The government points to the statements of five contractors that they would no longer supply NFIs within North Dakota. A sixth has informed the government that it will comply with North Dakota's regulations but an additional charge will be added to the price of the liquor destined for NFIs at North Dakota bases. *See* Motion to Affirm at 11-12. The State Treasurer of North Dakota informed the court below that other out-of-state suppliers had indicated their willingness to meet the state regulations. Affidavit of North Dakota State Treasurer Robert Hanson ¶ 6, J.A. at 34. The Record below does not reveal whether these other out-of-state suppliers would supply liquor without a cost increase. Nor is there any record evidence establishing that, even if the total number of bidders were reduced in response to North Dakota's regulations, higher costs would, in fact, result.

[14] The government seeks to attribute to the state the independent decisions of these potential contractors to cease providing liquor. This represents an unsuccessful effort to rely on such cases as *Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 544 (1958), in which the Court voided state regulations that "place[d] a prohibition on the Federal government" by barring any carrier in California from bidding for government transportation contracts at rates below the state minimum. *See also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956)(state law barring construction contractors from working in state without a permit will not apply to federal contractors).

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is free to choose the extent to which it will pass along the cost, if any, of North Dakota's regulations to NFIs. Faced with the pressures of competition for business, an out-of-state supplier may choose to absorb the entire cost itself.

Even if the out-of-state suppliers were to increase the prices charged NFIs, such higher prices would not void the regulations as an impermissible tax[15] or an otherwise unlawful "enforced contribution[] to provide for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931). North Dakota does not obtain any revenue from either the labels or reports required by its regulations. Indeed, nothing in the state regulations requires the liquor suppliers to collect the cost of obtaining and affixing the stamps from the federal government.[16]

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The situations in *Public Utilities Comm'n* and *Leslie Miller, Inc.*, are readily distinguishable from the current case because North Dakota neither prohibits nor restricts any bids by out-of-state suppliers.

[15] *Cf. United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 608-09 (1975)("*Mississippi Tax Comm'n II*")(Where state law requires the federal suppliers to collect a state tax from the federal government, as the ultimate purchaser, such taxes are an impermissible encroachment on federal authority.)

[16] *Compare Mississippi Tax Comm'n II*, 421 U.S. at 613-14. At most, North Dakota's regulations might cause the economic incidence of the cost of the label to fall on the United States. *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941)(allowing states to collect taxes from federal contractors because only the economic incidence of the state tax falls on the federal government).

Any indirect increase in costs that might occur is not a basis for finding preemption. To do so would ignore this Court's rulings upholding state regulation of federal contractors, notwithstanding any incidental increase in the cost of the goods supplied to the federal government. *E.g., James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 104 (1940). State regulation serving legitimate ends does not impermissibly interfere with federal procurement, so long as charging higher prices to the government is not compelled. *See Public Utilities Comm'n of Cal. v. United States*, 355 U.S. 534, 543 (1958)(listing cases which sustain state safety regulations on federal contractors).[17]

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[17] In *Baltimore & Annapolis R.R. Co. v. Lichtenberg*, 176 Md. 383, 4 A.2d 734 (1939), *appeal dismissed for want of a substantial federal question sub nom. United States v. Baltimore & Annapolis R.R. Co.*, 308 U.S. 525 (1939), the Maryland Court of Appeals upheld the State's authority to require a federal contractor, transporting federal employees by truck from WPA facilities in Baltimore to the Navy Department's worksites in Annapolis, to obtain a state permit and pay a state license fee. "Such an independent [contractor], . . . must . . . be considered unchangeably subject to the [state] law in its operation whether it [provides] its services [to] the [Federal] Government or [to] . . . private enterprises." 176 Md. at 393, 4 A.2d at 738. This Court has cited *Baltimore & Annapolis R.R. Co.* with approval in *Sadrakula*, 309 U.S. at 104, and *Public Utilities Comm'n of Cal.*, 355 U.S. at 543. In both cases, the Court noted that Congress has the power to override state safety regulation. The federal government's argument that increased costs due to safety regulations "would 'make it difficult or impossible' for the [federal] government to obtain the service it needs" was unavailing in the absence of evidence that Congress had acted to relieve the federal government contractors of their obligations under state safety laws. *Sadrakula*, 309 U.S. at 104.

Properly interpreted, the state regulations and the federal law are not in conflict. The federal statute does not make price the sole consideration in purchasing; instead, the regulations require NFIs to consider "other factors," such as state anti-diversion concerns, in purchasing liquor. The state regulation of the out-of-state supplier merely complements the regulation already imposed on in-state suppliers. The out-of-state suppliers have unfettered discretion to decide whether they will increase or maintain the prices they charge NFIs because of the state regulation. Indeed, the out-of-state suppliers are free to lower prices to compete for NFI contracts. When state law creates minimal burdens on nongovernmental entities, on a nondiscriminatory basis, that law is not preempted by federal procurement law.

II.

North Dakota's Regulations, Reasonably Designed To Control The Diversion Of Liquor Within Its Borders, Are Protected By Section 2 Of The Twenty-First Amendment.

Section 2 of the Twenty-First Amendment empowers the states to regulate or prevent commerce in liquor within their borders. North Dakota's regulations advance this "core purpose" of the Twenty-First Amendment by protecting against unrestrained diversion of liquor from military bases. The federal government's assertion of military procurement power in an attempt to void North Dakota's narrowly-tailored regulations ignores the broad mandate of Section 2 and mistakenly characterizes the state regulation of out-of-state liquor suppliers as regulation of the federal military.

A. The Express Language of Section 2 Affirms the States' Broad Power to Control Liquor Traffic Within Their Borders.

North Dakota's authority to monitor out-of-state liquor shipped into its territory through reporting and labelling regulations is, in the first instance, determined by the language and structure of Section 2 of the Twenty-First Amendment, which provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. amend. XXI, § 2.

The text of Section 2 is striking in its simplicity. By its terms, a state has unlimited authority to prohibit liquor from being shipped or imported into the state. No language conditions or limits this authority. Any contrary interpretation seeking to restrict or deny state authority over liquor distribution must overcome a heavy burden to avoid the plain meaning of the Amendment.

From its adoption, Section 2 was viewed as giving the states total control over liquor within their borders. The state could remain "dry"; the state could distribute liquor only through state stores; the state could regulate all aspects of liquor distribution; and so forth. *See generally Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939). The constitutional authority conferred by the Twenty-First Amendment is not qualified by any condition suggesting an overriding interest in the federal government to disturb state laws reasonably pursuing legitimate state purposes by controlling the distribution of liquor within state borders.

Because this Section 2 grant of power to the states is unique and so potentially overwhelming, the Court has carefully limited its application of Section 2 to situations where the state regulations are "closely related to the powers reserved by the Twenty-First Amendment." *Capital Cities Cable*, 467 U.S. at 714. The Court has refused to give state regulations broad effect only when a state is unable to establish that its regulations or laws were adopted to control liquor commerce and use within its borders. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). Conversely, when the state regulations are "closely related" to the Section 2 power, the Court has found that "the [state] regulation may prevail, notwithstanding that [the state's] requirements directly conflict with express federal policies." *Capital Cities Cable*, 467 U.S. at 714.[18]

B. The Drafters of Section 2 Intended to Grant States Extraordinary Power to Regulate Liquor Traffic and Commerce within Their Borders.

The broad language of Section 2 is consistent with the purposes expressed by the framers of the Twenty-First Amendment.[19] In presenting the resolution to the Senate,

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[18] The Court noted that efforts should be made to " 'harmonize state and federal powers' within the context of the issues and interests at stake in each case." *Capital Cities Cable*, 467 U.S. at 714 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 109 (1980)).

[19] As reported to the Senate, the proposed Amendment contained four sections: Section 1 repealed the Eighteenth

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Senator Blaine[20] reviewed the history of limitations on state power over liquor commerce and explained the need for Section 2.

> [T]o assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.
>
> Mr. President, the pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity – namely, intoxicating liquor. In other words, the State is not surrendering any power that it possesses, but rather,

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Amendment; Section 2 gave states plenary authority over all liquor commerce within their borders; Section 3 would have granted to Congress the power to regulate, concurrently with the states, the sale of liquor to be consumed on the premises where sold; and Section 4 set forth the method by which the Amendment was to be adopted. As adopted, Sections 1 and 2 remained unchanged from the version debated on the Senate floor; Section 3 (the grant of federal power to prevent the return of the saloon) was dropped from the resolution prior to Senate approval; and Section 4 (now Section 3) was changed to provide for adoption by state conventions called for that purpose instead of adoption by state legislatures.

[20] Senator Blaine introduced Senate Joint Resolution 211 which was recommended for passage (after being rewritten) by the Senate Judiciary Committee. 76 Cong. Rec. 64-65, 1621 (1933). The Committee Report on the Joint Resolution consisted only of the text of the resolution. *Id.* at 1621. As the floor leader for the Senate debate on the resolution, Senator Blaine explained the Committee's action in light of the history of limitation on state power over liquor commerce. *Id.* at 4139-40.

by reason of this provision, in effect acquires powers that it has not at this time.

The committee felt that since the Congress had acted and had definitely legislated upon this question[21], while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee the so-called dry States the protection designed by Section 2.

I am opposed to dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors.

76 Cong. Rec. 4141 (1933).

Senator Borah, a major opponent of repeal, also proclaimed the necessity for Section 2 to protect the dry states when it appeared likely that the repeal of prohibition would pass.[22] He stated that Section 2 was the

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[21] Senator Blaine was referring to the Wilson Act, ch. 728, 26 Stat. 313 (1890)(codified at 27 U.S.C. § 121 (1982)), and the Webb-Kenyon Act, ch.90, 37 Stat. 699 (1913)(codified at 27 U.S.C. § 122 (1982)). In those pre-Prohibition Era Acts, Congress "regulated interstate commerce to the point of removing all immunities of liquor in interstate commerce," 76 Cong. Rec. 4140 (1933)(statement of Sen. Wagner), but it did not *grant* power to the states. Senator Blaine agreed with this statement summarizing the exact legal effect of those acts. *Id*. By contrast, Section 2 is an affirmative, constitutional grant of power to the states.

[22] Senator Robinson of Arkansas had moved to strike Section 2 from the proposed amendment. 76 Cong. Rec. 4170

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constitutionalization of the Webb-Kenyon Act,[23] which would protect the rights of a state to enforce its own policies concerning liquor. *See* 76 Cong. Rec. 4172 (1933). Senator Walsh of Montana also noted the importance of Section 2:

> The purpose of the provision [§ 2] in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State *once it passed the State line and before it gets into the hand of the consignee as well as thereafter*.

76 Cong. Rec. 4219 (1933)(emphasis added).

Each of these statements reflected the prevailing view of the scope of the new power Section 2 affirmatively granted to the states: states should have the power to regulate even interstate transportation to prevent diversion of the liquor into their jurisdictions in violation of state liquor laws. This is, as the Court has characterized it, the "core § 2 power" of the states under the Twenty-First Amendment. *Capital Cities Cable*, 467 U.S. at 713.

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(1933). Senator Borah opposed the deletion of Section 2. Even after Senator Robinson amended his amendment to eliminate proposed Section 3 (granting power to Congress to prohibit saloons) instead of Section 2, 76 Cong. Rec. 4171 (1933), Senator Borah continued with his discussion of the necessity of Section 2.

[23] Senator Borah spoke figuratively about constitutionalizing the Webb-Kenyon Act, for as Senator Blaine noted "by reason of [§ 2], [the State] acquires *powers that it has not at this time*." 76 Cong. Rec. 4141 (1933) (emphasis added); *compare* discussion of Webb-Kenyon Act by Senators Blaine and Wagner, *id*. at 4140 (*see supra* note 21).

C. North Dakota's Jurisdictional Reach under Section 2 Extends to Regulation of Out-of-State Suppliers of Liquor to NFIs on Concurrent Jurisdiction Bases within the States' Borders.

The Twenty-First Amendment preserves for the states plenary power over liquor destined "for delivery or use therein." U.S. Const. amend. XXI, § 2. Since this authority does not specifically include liquor passing through a state to another destination, in several cases, the Court has ruled that the Twenty-First Amendment provides no authority for state regulations affecting the transportation of liquor if the shipment is not destined for delivery in that state. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938). On the other hand, state regulation of liquor commerce, even of "pass-through" shipments, is upheld if such regulation does not "forbid the traffic in liquor, nor . . . impede it more than is reasonably necessary to . . . afford [the local authorities an] opportunity [] to police [the transportation]." *Duckworth v. Arkansas*, 314 U.S. 390, 393 (1941)(relying on state police powers to regulate interstate liquor commerce to protect local health and safety). *See also Carter v. Virginia*, 321 U.S. 131, 135 (1944).

Federal territory within a state has also raised questions of the states' jurisdictional reach under the Twenty-First Amendment. When faced with such questions, the Court has focused on whether the federal government exercised exclusive jurisdiction[24] or merely shared

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[24] When the federal government has exclusive jurisdiction over a federal enclave, its authority generally cannot be

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concurrent jurisdiction with a state over the enclave. Even as to federal exclusive jurisdiction enclaves, the Court has allowed states to regulate, under their police powers, pass-through shipments while in transit,[25] and to restrict, under their Section 2 power, any transportation of liquor from the federal exclusive jurisdiction bases into the state.[26]

When a state has concurrent jurisdiction over a federal enclave within its borders, it may exercise its jurisdiction "consistent with the [federal] governmental

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restricted by state law. For example, federal government contractors, operating on federal exclusive jurisdiction installations in a state, are exempt from payment of a state liquor tax. *Collins*, 304 U.S. 518 (1938). Nor may state authorities seize liquor destined for delivery to federal exclusive jurisdiction reservations within a state, at least where the state has no law regulating the transportation of liquor on other, legitimate state grounds. *Compare Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944) *with Duckworth*, 314 U.S. at 393.

[25] A state can "properly exercise its police powers to regulate and control such shipments during their passage through [the state] insofar as necessary to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State' . . . ." *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 377-78 (1973)(*"Mississippi Tax Comm'n I"*)(quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333, 331 n.10 (1964); other citations omitted).

[26] "[T]he State . . . remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the [federal exclusive jurisdiction] bases of liquor that has been purchased and is in fact 'destined for use, distribution, or consumption' within its borders . . . ." *Mississippi Tax Comm'n I*, 412 U.S. at 378 (quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966); other citations omitted).

purposes for which the property was acquired." *James v. Dravo Contracting Co.*, 302 U.S. 134, 147 (1937); *Silas Mason Co. v. Tax Comm'n of Wash.*, 302 U.S. 186, 208 (1937). In *Mississippi Tax Comm'n II*, the leading case governing state power over liquor activity on concurrent jurisdiction enclaves, the Court struck down the state's attempt to impose a tax on the federal government for liquor being imported for use on concurrent jurisdiction bases. 421 U.S. at 613-14. Critical to the Court's analysis was its prior finding that the Mississippi tax scheme was not enacted as part of an effort to limit diversion of liquor.[27] When the question is not taxation but rather the reasonable regulation of shippers' transportation of liquor into the state, regardless of its destination, the Section 2 power of the State is predominant and should be upheld.

In its Motion to Affirm the decision below, the United States suggests that *Mississippi Tax Comm'n II* precludes all regulation of out-of-state suppliers of liquor to NFIs on concurrent jurisdiction bases. This analysis, however, mischaracterizes *Mississippi Tax Comm'n II*, since, in the case of concurrent jurisdiction bases, the Court has only forbidden state taxation – and specifically, only where the state places the legal incidence of the tax on the United States or its instrumentalities.[28]

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[27] *Mississippi Tax Comm'n I*, 412 U.S. at 378 ("[T]here is no indication here that the [Mississippi] markup is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for [the exclusive jurisdiction bases].").

[28] The United States has quoted from *Mississippi Tax Comm'n II*, 421 U.S. at 613, as follows:

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No such tax is imposed here.[29] Moreover, in other decisions, the Court has made clear that states have

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> the Court expressly held that "the Twenty-first Amendment confers no power on a State to regulate – whether by licensing, taxation, or otherwise – the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction *** [or] concurrent jurisdiction ***"

Motion to Affirm at 16 (ellipses and brackets as quoted by the United States). The government's ellipses suggested that the Court went further than it actually did in *Mississippi Tax Comm'n II*. Immediately after the end of the quoted language, in an amplification following a colon, the Court continues

> "Nothing in the language of the [Twenty-first] Amendment . . . leads to [the] extraordinary conclusion" that the Amendment abolished federal immunity *with respect to taxes* on sales of liquor to the military on bases where the United States and Mississippi exercise concurrent jurisdiction.

Mississippi Tax Comm'n II, 421 U.S. at 613-14 (brackets in original, emphasis added). The Court later stated "it is a 'patently bizarre' and 'extraordinary conclusion' to suggest that the Twenty-first Amendment abolished federal immunity *as respects taxes* on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction,. . . ." *Id.* at 614 (emphasis added). The broad limitation on state power over liquor destined for exclusive federal enclaves, pronounced in *Mississippi Tax Comm'n I*, 412 U.S. at 375 ("no [state] power . . . to regulate – by licensing, taxation, or otherwise"), reaffirms that a state's Section 2 power over liquor delivered to the territory of another sovereign is limited. By contrast, when liquor is destined for territory over which the state shares sovereignty, the state may use its Section 2 power, provided it does not undermine the federal government's immunity from direct state taxation. *See Mississippi Tax Comm'n II*, 421 U.S. at 613-14.

[29] *See supra* note 15 and accompanying text. *Cf. Skinner v. Mid-America Pipeline Co.*, 109 S.Ct. 1726 (1989).

broader power to enforce their laws and regulations on concurrent jurisdiction bases. *See Paul v. United States*, 371 U.S. at 269-70 (sales of milk by NFIs on concurrent jurisdiction bases may be subject to state price control laws). In addition, state power over liquor commerce is, by operation of the Twenty-First Amendment, greater than its power over other commodities.

Here, the out-of-state suppliers are providing liquor for use in territory over which North Dakota has concurrent jurisdiction. Given this fact, it is clear that North Dakota is authorized to use its "core Section 2 power" to regulate the activities of the out-of-state suppliers in a reasonable fashion in order to protect against the diversion of liquor into the state except in compliance with North Dakota distribution regulations.[30]

The state regulations challenged by the United States are directed at tracking out-of-state liquor so that North Dakota can determine what measures are necessary to prevent liquor leaving the bases in violation of its "no importation for personal use" laws.[31] The labelling regulation allows North Dakota to monitor the "leakage" of

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[30] *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1964)("We may assume that if in *Collins* California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, *in the interest of preventing unlawful diversion into her territory*, California would have been constitutionally permitted to do so."(emphasis added)) (citing as authority the *Duckworth* and *Carter* cases and acknowledging the possibility of Section 2 authority as well).

[31] *See supra* notes 2 & 3 and accompanying text.

liquor from the bases into the state. The presence of labelled liquor outside of the military base would be evidence that unauthorized diversion has occurred. Similarly, the reporting requirement creates a form of "early warning" system. If the amount of liquor being supplied the bases appears to be excessive, North Dakota can take steps to discover whether leakage is occurring.

North Dakota's regulations are both reasonable and narrowly confined to the potential problems it faces. More intrusive measures could probably have been taken without valid constitutional challenge from the United States. For example, North Dakota could erect roadblocks outside the entrances to the bases and search cars suspected of importing liquor into the state.[32] Alternatively, it could maintain surveillance of the package stores by lawful entry on the bases and by following the customers of NFI package stores when they leave the base.[33] That North Dakota has chosen a less restrictive alternative deserves praise, not challenge. By taking the narrower and more limited reporting and labelling steps set forth in its regulations, North Dakota prudently and lawfully exercised its Section 2 power over liquor traffic on concurrent jurisdiction bases.

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[32] *Cf. Morgan's S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886)(upholding state quarantine regulations which interrupted interstate and foreign commerce for purpose of inspecting vessels).

[33] *See Maryland v. Barry*, 604 F. Supp. 495 (D.D.C. 1985)(describing efforts of Maryland and Virginia to enforce their liquor laws by observing D.C. liquor store customers and arresting those that transported products into their jurisdictions in violation of state importation laws).

D. It is Unnecessary for the Court to Address the United States' Contention that the Section 2 Power is Limited by the Federal Government's Military or Property Power.

Relying on *dicta* in cases addressing other issues,[34] the United States suggests (1) that the power of the states under Section 2 is restricted to interstate commerce issues[35], and (2) that it has no effect when the federal government purports to exercise other powers of the Constitution such as the power to regulate the military (U.S. Const. art. I, § 8, cls. 12-14, 17) or the power to regulate federal property (U.S. Const. art. IV, § 3, cl. 2). The first

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[34] Motion to Affirm at 14 (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)).

[35] Contrary to the government's assertion, the Court has acknowledged that state laws adopted under Section 2 to prevent diversion may have an effect over areas distinct from the interstate commerce clause. In *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345 (1964), the Court distinguished between a Kentucky import tax, which was held to violate the Export-Import clause (U.S. Const. art. I, § 10, cl. 2) and Texas's permit system which the Court had upheld in *Gordon v. Texas*, 355 U.S. 369 (1958)(mem.). It explained that no state tax had been imposed on imports in *Gordon*; rather Texas's permit system "serve[d] to channelize the traffic in liquor and thus prevent diversion of that traffic into unauthorized channels." *Department of Revenue*, 377 U.S. at 345. Thus, in *Gordon*, Texas was held to have the power to administer an import permit system to prevent diversion of liquor into state commerce under Section 2 of the Twenty-First Amendment, even though the permit system may have the incidental effect of limiting liquor imports from a foreign country into Texas.

argument fails to recognize that the asserted limitation was enunciated in cases addressing significantly different issues.[36] None involved limited controls placed on out-of-state suppliers of liquor to concurrent jurisdiction enclaves.

The court below echoed the second argument when it said that the state authority under Section 2 "reaches its limits when the state attempts to exercise that power over an instrumentality of the federal government itself." *United States v. North Dakota*, 856 F.2d 1107, 1111 (8th Cir. 1988). However, it is not necessary to address the balancing of respective constitutional powers because such powers are not in conflict here. *See supra* part I. The federal government's argument should, in any event, be rejected, since its claim that its military and property powers somehow "trump" all state regulation of liquor suppliers to NFIs would work a vast, unwarranted extension of federal immunity. If the states cannot enforce their regulations against suppliers of liquor to NFIs using admittedly one of the strongest grants of power to the states in the Constitution – their Section 2 power over liquor commerce – then almost every conceivable state

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[36] This Court, in *Craig v. Boren*, 429 U.S. 190 (1976), noted that "the [Twenty-First] Amendment primarily created an exception to the normal operation of the Commerce Clause." 429 U.S. at 206. It acknowledged, however, that other cases propounded a more expansive view of the Twenty-First Amendment and characterized those cases as involving "importation of intoxicants . . . where the State's authority under the Twenty-First Amendment is transparently clear. . . ." *Id.* at 207. Importation of liquor into North Dakota is, of course, at the heart of this case.

health and safety regulation would not apply to government suppliers and contractors.[37] Moreover, the government's argument would have the anomalous effect of barring a state from regulating the safety or diversion of liquor passing through the state if it were destined for any federal military base anywhere in that State but not if it were destined for delivery in another state. *Cf. Duckworth*, 314 U.S. 390 (1941); *Carter v. Virginia*, 321 U.S. 131 (1944).

The text, historical background, and prior Court interpretations of the Twenty-First Amendment all emphasize one theme: states have broad power to control liquor delivered within their borders. North Dakota seeks to protect itself and its citizens from the hazards posed by unregulated liquor on concurrent jurisdiction bases in the state by regulating the out-of-state suppliers of liquor to NFIs on those bases. In regulating the suppliers pursuant to its Section 2 "core power," North Dakota does not infringe on the federal military or property power. Whatever immunity the federal government may have from state liquor regulation does not derivatively extend to its suppliers.

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[37] While it is conceivable that the state regulations may not apply to commercial activities in which the federal government agencies directly engage, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it is quite a different matter to suggest that the federal agency immunity extends without limit to federal contractors. The government's reliance on *Mayo v. United States*, 319 U.S. 441 (1943), to immunize its contractors is therefore misplaced.

CONCLUSION

North Dakota's regulations reflect a carefully controlled state program designed to ensure that sales of liquor on military bases do not open a back door through which unregulated liquor would flood the state. The regulations, which are not preempted by federal procurement statutes or regulations, typify the "core power" conferred on states by the Twenty-First Amendment. This Court should reverse the decision below in order to prevent a serious impairment of the power of the states to regulate liquor distribution within their borders and to prevent an unwarranted limitation of the authority expressly granted to the states by the Twenty-First Amendment.

Respectfully submitted,

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May 1989

AMICUS CURIAE

BRIEF

No. 88-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NORTH DAKOTA, ROBERT E. HANSON,
STATE TREASURER OF NORTH DAKOTA,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether state regulations that require labeling and reporting of liquor shipped to military bases by out-of-state suppliers, adopted to prevent the diversion of that liquor into the State's domestic commerce, are preempted or are invalid as direct regulation of the federal government.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS:

STATUTES AND REGULATIONS:

Federal:

North Dakota:

5 N.D. Cent. Code (1975):

N.D. Admin. Code (1986):

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns North Dakota's power to regulate the importation of liquor by out-of-state suppliers. All persons sending liquor into North Dakota are required to file monthly reports of the shipments. In addition, in order to prevent the unlawful diversion of liquor into its domestic commerce, North Dakota required out-of-state suppliers of liquor to the two military bases within the State to affix identifying labels to the bottles. *Amici* are concerned because the decision below, which invalidated the State's regulations, took an unduly narrow view of state authority to regulate the importation of alcoholic beverages under its police power and an unduly broad view of the preemptive scope and effect of military procurement law and regulations. The decision also gave insufficient weight to the Twenty-first Amendment, which reserves to the States the power to control "the transportation or importation . . . for delivery or use therein of intoxicating liquors." Every State has some form of regulation governing the importation, distribution, and sale of alcoholic beverages.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

North Dakota closely regulates the manufacture, importation, and retail and wholesale distribution of liquor. The purposes of the State's regulation of the liquor distribution system are to promote temperance, ensure orderly marketing conditions, and raise revenue (J.A. 36). All resident liquor distillers, wholesalers, and retailers must be licensed by the State. 5 N.D. Cent. Code §§ 5-01-04, 5-03-01, 5-02-01 (1975). Since 1978, the

[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

State has required "[a]ll persons sending or bringing liquor into North Dakota" to file with the State Treasurer a monthly report "of all shipments and returns." N.D. Admin. Code § 84-02-01-05(1) (1986).[2]

The State Treasurer, appellant Robert E. Hanson, was aware of problems in his own and other States when liquor purchased for resale at military bases was diverted into the States' domestic commerce, bypassing their regular controlled distribution systems (J.A. 35-36). In order to prevent such unlawful diversion, a new regulation was adopted, requiring that bottles of liquor delivered by out-of-state suppliers to the two military bases in North Dakota be labeled to indicate that they were destined for on-base consumption.[3]

The regulation was scheduled to go into effect on January 1, 1986, but a federal law in effect at that time required that alcoholic beverages for military installations be purchased within the State where the installations were located. J.A. 15; P.L. No. 99-190, § 8099, 99 Stat. 1219. That requirement expired on October 29, 1986. Out-of-state procurement of liquor for military installations was resumed under a law providing that purchases of liquor for resale on military installations

[2] The State's Statement of Material Facts As to Which There Is No Genuine Issue sets forth the effective date of that section (J.A. 30), which was incorrectly given in the parties' stipulation (J.A. 14).

[3] The regulation, N.D. Admin. Code § 84-02-01-05(7) (1986), provides:

> All liquor destined for delivery to a federal enclave in North Dakota for domestic consumption and not transported through a licensed North Dakota wholesaler for delivery to such bona fide federal enclave in North Dakota shall have clearly identified on each individual item that such shall be for consumption within the federal enclave exclusively. Such identification must be in a form and manner prescribed and approved by the state treasurer.

"shall be made from the most competitive source, price and other factors considered." 10 U.S.C. § 2488 (Supp. IV 1986).

On November 5, 1986, Treasurer Hanson held a meeting with out-of-state suppliers of liquor to the military to explain the State's labeling and reporting requirements (J.A. 15). Labels are made available by the State Treasurer at a cost of three to five cents per label, but suppliers may choose to print their own labels on brightly colored "crack and peel" paper so long as the format is approved by the Treasurer (J.A. 34-35). The labels are not tax stamps (J.A. 34). The labeling requirement was adopted as a means of identifying intoxicants that are unlawfully diverted from the federal enclaves into the State's domestic commerce. *Ibid.*

After the meeting, one out-of-state supplier informed the Air Force of proposed price increases to compensate for the cost of affixing what were incorrectly described as "tax stamps" (J.A. 15, 18-19). One supplier notified the Air Force by letter that it would no longer honor orders for North Dakota because of the administrative costs and burdens of the new requirement (J.A. 15-16, 19); other suppliers gave similar notification by telephone (J.A. 23, 26); still other suppliers indicated willingness to comply (J.A. 31).

This action was then filed by the United States against the State of North Dakota and Treasurer Hanson, for declaratory and injunctive relief against enforcement of the North Dakota labeling and reporting requirements with respect to liquor delivered by out-of-state suppliers directly to the two military bases in the State.[4] The

[4] As noted above, the reporting requirement had been in effect since 1978, apparently without causing the federal government any problems. The only specific reference to the increased cost of compliance with the regulations (letter from Kobrand Corp., J.A. 18) mentioned only the cost of the label, which it incorrectly described as a tax stamp.

United States asserted that the North Dakota regulations violate the Supremacy Clause because they conflict with a federal regulation, 32 CFR § 261.4, which provides that purchases of liquor for the military "shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors" [*sic*] (see Motion to Affirm 3 n.2). The federal government asserted that if the military purchased liquor only from North Dakota wholesalers instead of from out-of-state distillers, its costs would rise by $200,000 to $250,000 annually (J.A. 26).

On cross-motions for summary judgment, the district court ruled in favor of the State, finding that North Dakota's requirements did not conflict with federal regulations; and that, even if there were a conflict, the State's interests underlying its regulations outweighed the corresponding federal interests, so that enforcement was not barred by the Supremacy Clause. A divided panel of the Eighth Circuit Court of Appeals reversed. The majority opinion, without discussing the labeling and reporting requirements separately, held that the Twenty-first Amendment did not authorize state regulation of military procurement; and that, even if the State had jurisdiction over the subject matter, the balance of state and federal interests would lead it to find preemption. Chief Judge Lay's dissenting opinion discussed only the labeling requirement, and found it squarely within the State's Twenty-first Amendment authority and not preempted.[5]

[5] For purposes of this case, we assume that the validity of the two requirements is subject to the same test, and discuss them together. We note, however, that the reporting requirement has applied to all importers of liquor into the State since 1978 and has not previously been protested.

SUMMARY OF ARGUMENT

In this case, the United States challenges under the Supremacy Clause North Dakota regulations requiring out-of-state suppliers of liquor to military bases within the State to label and account for their shipments, in order to prevent the diversion of liquor from those military bases to the State's civilian population. Such regulations lie clearly within the State's police power, related as they are to the public health and safety, even without regard to the Twenty-first Amendment, which specifically reserves that power to the States. Regulation of the traffic in liquor is one of those "areas traditionally regulated by the States" in which there is a "presumption against finding pre-emption of state law" (*California v. ARC America Corp.*, No. 87-1862 (April 18, 1989), slip op. 5). No federal statute or regulation preempts North Dakota's police power regulations. There is no direct regulation of the government of the United States or any of its instrumentalities, and the State is not precluded from regulating private contractors simply because they do business with the federal government. Thus, under settled constitutional principles and clear precedent of this Court, the challenge to the North Dakota regulations should be rejected.

Moreover, any doubt that the regulations are within the State's power to enact is resolved by the Twenty-first Amendment, which provides, in Section 2, that "the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." There is no federal interest sufficiently weighty to displace North Dakota's regulations, which were enacted pursuant to this constitutional command.

ARGUMENT

The panel majority below, which invalidated the regulations here at issue, reached the wrong conclusion because it asked the wrong question. The majority saw the issue as "whether State power extends so far as to enable the State here to regulate instrumentalities of the United States over which the State exercises concurrent jurisdiction" (J.S. App. A-6). The majority then pointed out—correctly—that absent congressional *authorization*, States may not regulate or tax federal instrumentalities. *See Mayo v. United States*, 319 U.S. 441, 446 (1943); *Hancock v. Train*, 426 U.S. 167, 179 (1976); *EPA v. State Water Resources Control Board*, 426 U.S. 200, 211 (1976). The error of the court below was in confusing regulation of government instrumentalities with regulation of private parties that indirectly affects the federal government. When, as here, the State regulates neither the federal government nor its instrumentalities, but only those who do business with the government, those regulations are valid absent congressional *preemption*. *See Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 269-70 (1943); *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 479-80 (1939).

The North Dakota regulations in question here are a valid exercise of the State's police power. They are not preempted by any federal statute or regulation. They impose no obligation on the federal government, but are directed only to private parties doing business with the United States. Accordingly, those regulations must be sustained.

I. THE NORTH DAKOTA REGULATIONS ARE A VALID EXERCISE OF THE STATE'S POLICE POWER.

There can be no serious dispute that North Dakota's regulations fall squarely within its inherent police power. North Dakota has determined that importation of liquor

and its distribution within the State should be regulated in the public interest. Regulation of the traffic in liquor is one of those "areas traditionally regulated by the States" (*California v. ARC America Corp.*, No. 87-1862 (April 18, 1989) slip op. 5)[6]; and the regulations at issue here are far less intrusive than others on the same subject that have been upheld by this Court as valid exercises of the police power. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887).

With the exception of the United States military, all persons who wish to purchase alcoholic beverages in the State of North Dakota must do so through a licensed state wholesaler (or retailer) pursuant to a detailed statutory scheme. That scheme serves the strong public interests of safety, health, and revenue. Because the United States military alone is allowed to purchase liquor outside the State, the military can obtain liquor at prices lower than those available to commercial distributors within the State. Therefore, it is, perhaps, inevitable that a black market would develop in liquor diverted from the military bases. The North Dakota State Treasurer learned that such diversion was taking place, and adopted the labeling regulation in an attempt to prevent it. The challenged regulations simply provide that out-of-state distillers shipping liquor directly to military bases in North Dakota must label the bottles and provide an account of their shipment.[7]

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[6] *See Carter v. Virginia*, 321 U.S. 131 (1944); *Duckworth v. Arkansas*, 314 U.S. 390 (1941); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *see also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333 (1964).

[7] The reporting requirement, which has been in effect since 1978, applies to all distillers shipping liquor into the State, not just to suppliers of the military. N.D. Admin. Code § 84-02-01-05(1) (1986).

Secretary Hanson's explanation of the regulations' purpose is uncontradicted: to prevent the diversion of alcoholic beverages from military bases to the general population. The record below indicates that without some such requirement the entire state regulatory scheme may be undercut by black market sales of liquor shipped to military bases by out-of-state suppliers.[8] Thus, the regulation would be sustainable even in the absence of the Twenty-first Amendment; that Amendment removes all doubt.[9]

II. THE NORTH DAKOTA LABELING AND REPORTING REGULATIONS ARE NOT PREEMPTED BY MILITARY PROCUREMENT LAW OR REGULATIONS.

We accept, *arguendo*, for purposes of this case, that Congress, should it wish to do so, could preempt the regulations here in issue. There is, however, no federal statute or regulation with such preemptive effect.

A. The Regulations Are Not Preempted By Any Federal Statute.

Just last month, in *California v. ARC America Corp.*, No. 87-1862 (April 18, 1989), the Court recapitulated "[t]he path to be followed in pre-emption cases":

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[8] The State Treasurer's affidavit recites information he received of diversion of liquor from the North Dakota bases to the State's non-military population (J.A. 49-51). Because the federal government specified neither the quantity of liquor purchased outside the State for the two bases nor the population of the bases, it is not possible to make the kind of per capita computation of consumption that made it virtually certain that there was considerable off-base diversion of liquor in the State of Washington (letter from Washington Liquor Control Board, at J.A. 42).

[9] *See Carter v. Virginia*, 321 U.S. at 135; *Duckworth v. Arkansas*, 314 U.S. at 396; *Ziffrin, Inc. v. Reeves*, 308 U.S. at 138-39 ("The state may protect her people against evil incident to intoxicants, *Mugler v. Kansas*, 123 U.S. 623; *Kidd v. Pearson*, 128 U.S. 1; and may exercise large discretion as to means employed.").

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213 (1983). Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See, *e.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Slip op. 5.[10] North Dakota's regulations do not fall under any of these tests.

Here, there is plainly no express statement of pre-emption. The United States relies on a statute enacted to restore the option of a military installation to purchase liquor outside the State in which it is located. The law provides that purchases of liquor for resale on military bases "shall be made from the most competitive source, price and other factors considered." 10 U.S.C. § 2488 (Supp. IV 1986). There is not one word in the law to indicate that the statute was intended to override valid state liquor regulation. To the contrary, the North Dakota regulations appear to fit within the statutory reference to "other factors"—*i.e.*, factors other than "price" —that procurement officials are directed to consider.

Nor is there any indication that Congress has occupied the field to the extent that North Dakota's regulations

[10] *See also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).

are inconsistent with the federal regulatory scheme. Congress is precluded by the Twenty-first Amendment from occupying the field of liquor regulation. An argument that Congress has preempted these regulations by occupying the field of military procurement assumes that Congress intended to invalidate any state law that had the incidental effect of raising the price at which the military obtains goods and services. This assumption the Court has already rejected. *See Penn Dairies*, 318 U.S. at 272 (statutes directing military procurement officials "to invite competitive bidding by contractors undertaking to furnish Army supplies," and "to accept the lowest responsible bid" "do not purport to set aside local price regulations").

Finally, as to conflict preemption, it cannot seriously be contended that compliance with both state and federal law is impossible. The court below apparently accepted all this, instead invalidating the North Dakota regulations on the ground that they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." J.S.App. A-14 (citations omitted). The majority reasoned that Congress' objective was to maximize profit on the sale of liquor by the military.[11] The North Dakota regulations were held to be invalid because they had the incidental effect of raising the price at which the military could purchase liquor, and thereby cut into the profit the military could make on the resale.

[11] Congress's objective is not single-minded. This general policy frequently gives way before other policy objectives reflected in numerous federal statutes that make it more expensive for the federal government to do business. See, *e.g.*, Davis-Bacon Act, 40 U.S.C. § 276a; Buy American Act, 41 U.S.C. § 10a *et seq.*; Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*; Service Contract Act, 41 U.S.C. § 351 *et seq.* The Twenty-first Amendment plainly is at least as important as a statutory policy; it represents a constitutional command.

This reasoning proves too much. Of course Congress ordinarily intends federal authorities to conduct business in the most economic fashion possible. But countless state regulations, in addition to the regulations at issue here, have an incidental effect on the price at which the military obtains goods and services: pollution laws, minimum wage laws, and safety laws are but a few examples.[12] Acceptance of the holding below would operate to invalidate all state laws that incidentally raise the military's procurement expenses. Congress could not have intended, without expressly saying so, to take the drastic step of preempting all such laws.

This Court, for sound policy reasons, long ago rejected the view that state regulation of private parties that do business with the federal government is invalid simply because it has the incidental effect of increasing the federal government's costs. *Penn Dairies* is dispositive. In that case, the State had set a minimum price for the sale of milk to all purchasers, including the military. One seller, joined by the United States, advanced essentially the argument relied on by the majority below here: that enforcement of the State's minimum price for milk raised the cost at which the military could obtain milk. Notwithstanding the exigencies of war and federal statutes that "direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid" (318 U.S. at 272), the Court rejected that argument. Competitive bid and low bid statutes "do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations." *Ibid.*[13]

[12] Chief Judge Lay, dissenting below, referred to "the myriad of state regulations applied to distillers and suppliers of liquor" which "necessarily increase the cost of liquor." J.S. App. A-21.

[13] The United States contends, and the court below agreed, that *Penn Dairies* is not controlling because of the later decision in *Paul v. United States*, 371 U.S. 245 (1963). In *Paul*, this Court held that federal statutes and regulations enacted subsequent to the *Penn Dairies* decision precluded the application of California's minimum price law to milk purchased by the Armed Services from appropriated funds. Two factors distinguish *Paul* from the present case. First, the regulations at issue in *Paul* applied only to purchases made with appropriated funds; here, only nonappropriated funds are involved (J.A. 13). (The *Paul* decision did find preemption with respect to purchases made from nonappropriated funds at military enclaves over which the United States had exclusive jurisdiction; but in this case, the federal government's jurisdiction is not exclusive. J.S. App. A-3.) Second, and more important, in *Paul*, the Court found a "collision . . . clear and acute" (371 U.S. at 253) between the federal regulation mandating competitive bidding and the State's minimum price law. As the discussion in the text demonstrates, no such collision exists in this case. Accordingly, *Paul* is on its facts a very different case, and *Penn Dairies* remains dispositive here.

Particularly pertinent here is the Court's admonition in *Penn Dairies* that "[a]n unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred" (318 U.S. at 275). The Court stated (*id.* at 275-76):

> [I]n the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike

down legislation which the state concededly had power to enact, because of its asserted burden on the federal government.

B. The Regulations Are Not Preempted By Any Federal Regulation.

Where state law is claimed to be preempted by federal regulation, two questions must be asked: first, whether Congress has authorized the regulatory preemption in question; and second, whether the agency in fact intends to preempt state law. *See, e.g., City of New York v. FCC*, 108 S.Ct. 1637, 1642-43 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). In this case, neither question can be answered in the affirmative.

First, the United States has failed entirely to show that Congress authorized it to preempt state liquor control regulations like North Dakota's labeling and reporting requirements. The government's argument, similar to its argument of statutory preemption, appears to be that preemption is authorized of any state regulations that may incidentally increase military procurement costs. But had Congress, which chose not to exercise such extraordinarily sweeping preemptive authority itself, intended to confer that authority on the Department of Defense, one would expect the clearest evidence of its intent to do so. There is, however, no explicit grant of such authority, and no basis for a ready inference of such authorization. There is no agency possessing plenary regulatory authority (*cf. Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982)) or legislation resting on a "background of federal preemption" (*City of New York v. FCC*, 108 S.Ct. at 1643).

In this case, the source of the authority claimed by the Department of Defense is uncertain, at best. The allegedly preemptive regulation, 32 CFR § 261.4, was not even adopted pursuant to the statute claimed as the basis for statutory preemption (10 U.S.C. § 2488 (Supp.

IV 1986), discussed above).[14] It was adopted pursuant to an entirely different statute, 50 U.S.C. App. § 473 (1982 & Supp. IV 1986) (see Authority, 32 CFR Part 261), which authorizes only regulations "governing the *sale, consumption, possession of or traffic* in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces" (emphasis supplied). A regulation that would have the effect of preempting state labeling and reporting requirements imposed on suppliers from whom the government *purchases* liquor is not within the scope of the authority conferred by Section 473.

Second, the regulatory language itself gives no inkling of preemptive intent. Section 261.4 uses the same "price and other factors" language as the procurement statute discussed above.[15] The United States' argument of regulatory preemption appears to rest not on any explicit preemption, but on the same considerations as its

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[14] The government could not have relied on 10 U.S.C. § 2488 (Supp. IV 1986) as the source of regulatory authority to preempt because the regulation was not amended or re-issued after Section 2488 was enacted in 1986 to remove the restriction on out-of-state liquor purchases.

[15] The regulation, entitled "Procedures," sets forth Section C of chapter 4 of DoD 1015.3-R, as follows:

> *C. COOPERATION.* The Department of Defense shall cooperate with local, state, and federal officials to the degree that their duties relate to the provisions of this chapter. However, the purchase of all alcoholic beverages for resale at any camp, post, station, base, or other DoD installation within the United States shall be in such a manner and under such conditions as shall obtain for the government the most advantageous contract, price and other considered factors [*sic*]. These other factors shall not be construed as meaning any submission to state control, nor shall cooperation be construed or represented as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state.

argument of statutory preemption, *i.e.*, that the federal procurement scheme permits no state law that may occasion additional expense for military authorities. This Court has stated, however, that "because agencies normally address problems in a detailed manner . . ., we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985). Therefore, the Court "will seldom infer, solely from the comprehensiveness of federal regulations, an intent to preempt in its entirety a field related to health and safety." *Ibid.*

Rather than preempting North Dakota's labeling and reporting requirements, the regulatory scheme is in fact consistent with those requirements. The regulation instructs the Department of Defense to "cooperate" with local and state officials. It specifies that "cooperation" is not to be construed "as an admission of any legal obligation to submit to state control, pay state or local taxes, or purchase alcoholic beverages within geographical boundaries or at prices or from suppliers prescribed by any state." 32 CFR § 261.4. But North Dakota's regulations do none of these things: they do not purport to control federal instrumentalities or agents; they impose no taxes; they do not prescribe prices; and they do not limit the suppliers from whom the military installations may purchase liquor. North Dakota's regulations serve only to prevent the diversion of liquor from military bases, a goal wholly consistent with Department of Defense policy, which explicitly prohibits diverting untaxed liquor from federal enclaves to intrastate commerce.[16]

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[16] DoD 1015.3-R, ch. 4, § F3 (1982), cited in dissenting opinion below (J.S. App. A-21 n.3) and in Motion to Affirm 14 n.14.

III. THE NORTH DAKOTA LABELING AND REPORTING REQUIREMENTS DO NOT REGULATE INSTRUMENTALITIES OF THE UNITED STATES.

As we have shown, the North Dakota labeling and reporting requirements are not preempted by any federal law or regulation and are therefore valid. The court below nevertheless struck down these requirements because of its failure to distinguish between direct regulation of government instrumentalities, which is precluded by the Supremacy Clause absent congressional consent, and regulation of persons who do business with the federal government, which is valid absent congressional preemption.

It is well settled that private parties are not immunized from generally applicable state laws simply because they happen to deal with the United States. *Penn Dairies* made that clear. In that case, the Court upheld the application of Pennsylvania's minimum milk price regulations to a private contractor selling milk to the United States, even though the result would be to raise the price that the United States had been paying for milk. As the Court stated:

> [I]n the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation.

318 U.S. at 269 (citations omitted).

Because of the way the majority below framed the issue, it regarded as controlling this Court's decisions in the Mississippi tax cases.[17] In those cases, Mississippi required out-of-state distillers to charge their governmental purchasers a markup to be remitted to the Commission. The Court found that this "markup" was indistinguishable from "a sales tax which must be collected by the seller and remitted to the State." *Tax Commission II*, 421 U.S. at 608. Accordingly, the "legal incidence of the tax" fell upon the purchasers, the military installations that were instrumentalities of the United States. *Ibid.*

In the present case, by contrast, there is no attempt either to tax or otherwise to regulate any government instrumentalities. The military bases, which are government instrumentalities, are not required to pay anything, or to do anything. The regulation is directed exclusively at the conduct of the out-of-state suppliers, who are required only to label and account for liquor shipped into North Dakota outside its regular distribution system. Even those out-of-state suppliers pay no tax,[18] and collect no markup. North Dakota seeks no revenue from the federal government or its out-of-state suppliers; it requires only that those suppliers conduct their business in a manner that will avoid the unlawful diversion of liquor shipped to military bases into the State's domestic commerce.

[17] *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363 (1973) (*"Tax Commission I"*), and *United States v. State Tax Comm'n of Mississippi*, 421 U.S. 599 (1975) (*"Tax Commission II"*).

[18] The regulation would be valid even if it did. The Court has held that a State may impose a nondiscriminatory tax on businesses that contract with the federal government. *See, e.g., United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. City of Detroit*, 355 U.S. 466 (1958); *Alabama v. King & Boozer*, 314 U.S. 1 (1941). The regulation in this case cannot be said to discriminate against the federal government (*cf. Davis v. Michigan Dep't of Treasury*, 109 S.Ct. 1500 (1989)) by being targeted at out-of-state suppliers of liquor to the two military bases. It is so targeted simply because the State permits no other unlicensed person to import alcoholic beverages (*see Washington v. United States*, 460 U.S. 533 (1983)) and seeks to prevent the illegal diversion of imported liquor to the State's civilian population.

If out-of-state distillers who contract with the government to furnish liquor to the two North Dakota military bases are unwilling to comply with the requirements, they have the option of leaving the government business to their competitors, both inside and outside the State. Even if this results in a slight increase in the cost of military liquor procurement,[19] the requirements are not thereby converted to regulation of the federal government. They remain regulation of private parties, and, absent preemption, valid.

IV. NORTH DAKOTA'S REGULATIONS FALL WITHIN THE STATE'S CORE POWERS UNDER THE TWENTY-FIRST AMENDMENT.

As we have demonstrated, North Dakota's challenged regulations represent a proper exercise of the police power; they are not preempted by federal law or regula-

[19] The court of appeals expressed some discomfort with the government's estimate of an increased annual cost of $200,000 to $250,000, and the State's failure to contest it. In fact, the estimate is not particularly meaningful because (1) the estimate represents the cost of purchasing only from in-state wholesalers, although some out-of-state suppliers are willing to comply with North Dakota's regulations; (2) it may be insignificant in relation to the current cost, which is not given; (3) it ignores the opportunity to pass on any increase in costs to purchasers. In the absence of such pertinent information, the estimate cannot materially assist the government's motion for summary judgment.

Ironically, the greater the government's potential loss, the greater the need for the regulation, because the more liquor the government purchases the more likely it is that some will find its way to the civilian population. See letter from Washington State Liquor Control Board to Assistant Secretary of Defense Cox, referring to military liquor purchases at Sand Point facility in Seattle equivalent to 85 cases per person employed on the base during 1986 (J.A. 42).

tion; and they do not tax or regulate the federal government or its instrumentalities. These regulations, moreover, represent an exercise of the State's "core power" under the Twenty-first Amendment to control "[t]he transportation or importation . . . for delivery or use therein of intoxicating liquors" (U.S. Const. Amend. XXI, § 2).

The Court has repeatedly recognized the "broad power" enjoyed by the States "under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984), citing *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939). In recent years, it is true, decisions of the Court have eroded much of the authority claimed by States under the Amendment. Challenged state legislation, which the Court found was not specifically directed to the Amendment's goals, has fallen to a conflicting exercise of federal authority. Thus, the Court has held liquor price control measures invalid under the Sherman Act (*324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)); has struck down under the Commerce Clause a tax exemption designed to foster the development of local liquor production (*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)); and has held a State's right to prohibit television advertising of liquor preempted by federal agency regulations (*Capital Cities Cable*).[20]

But, whatever doubt exists about the precise bounds of the Twenty-first Amendment today (*see South Dakota v. Dole*, 107 S.Ct. 2793, 2795 (1987)), the regulations at

[20] *See City of Newport, Ky. v. Iacobucci*, 107 S.Ct. 383, 386-87 (1986) (Stevens, J., dissenting) (noting that the only area in which States recently have successfully invoked the Twenty-first Amendment is in defending against First Amendment challenge the regulation of establishments in which liquor is sold for on-premises consumption).

issue here, unlike those which the Court has found invalid, fall indisputably within the State's "core" power under the Twenty-first Amendment.

North Dakota's licensed liquor distribution system, which is specifically authorized by the Twenty-first Amendment, was adopted to promote temperance, ensure orderly marketing conditions, and raise revenue—all legitimate state goals, even absent the Amendment. The regulations in question are carefully tailored to enable the system to continue to meet those goals. The labeling and reporting requirements were adopted as a means of identifying intoxicants that are unlawfully diverted from the State's two military bases into its domestic commerce. Thus, North Dakota seeks to accomplish only what the Court has repeatedly said it has the right to do: "to prevent the 'unlawful diversion' of liquor 'into the internal commerce of the State.'" *Tax Commission I*, 412 U.S. at 377-78, citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 333, 331 n.10; *Carter v. Virginia*, 321 U.S. 131 (1944); and *Duckworth v. Arkansas*, 314 U.S. 390 (1941).

These regulations, moreover, cause only minimal, if any, disruption of the military procurement process. The federal government does not assert that it must be free to sell liquor for redistribution in violation of state law; in fact, it supports the State's underlying policy.[21] The only federal interest to be weighed in the balance against the unassailable state goals served by the challenged regulations is the military's desire to maximize its profits from liquor sales.[22] Even that interest is not directly affected by the State's action; the military may be able to persuade suppliers to hold down any price increases, or, in the alternative, pass on any increases to on-base customers. Thus, the State must prevail in this case even

[21] See n.16 and accompanying text, *supra*.

[22] But see n.11, *supra*.

under the balancing test that the court below deemed appropriate.

Should the decision below be affirmed, North Dakota would be deprived of the means to protect its domestic commerce from illegal diversion of the liquor imported by the military bases into the State. If the Twenty-first Amendment is to retain any meaning, North Dakota's regulations must be sustained.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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May 25, 1989